No. 15-214

Title:	Joseph P. Murr, et al., Petitioners v. Wisconsin, et al.
Docketed:	August 18, 2015
Linked with 15A6	
Lower Ct:	Court of Appeals of Wisconsin, District III
Case Nos.:	(2013AP2828)
Decision Date:	December 23, 2014
Discretionary Court Decision Date:	April 16, 2015

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 27 2014	Reply of petitioners Joseph P. Murr, et al. filed.
Jun 26 2015	Application (15A6) to extend the time to file a petition for a writ of certiorari from July 15, 2015 to August 14, 2015, submitted to Justice Kagan.
Jun 30 2015	Application (15A6) granted by Justice Kagan extending the time to file until August 14, 2015.
Aug 14 2015	Petition for a writ of certiorari filed. (Response due September 17, 2015)
Sep 4 2015	Waiver of right of respondent Wisconsin to respond filed.
Sep 9 2015	Order extending time to file response to petition to and including October 16, 2015, for all respondents.
Sep 17 2015	Brief amici curiae of California Cattlemen's Association, et al. filed.
Oct 16 2015	Brief of respondent St. Croix County, Wisconsin in opposition filed.
Oct 29 2015	Reply of petitioners Joseph P. Murr, et al. filed.
Nov 4 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 28 2015	DISTRIBUTED for Conference of January 8, 2016.
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 15 2016	Petition GRANTED.
Feb 9 2016	The time to file the joint appendix and petitioners' brief on the merits is extended to and including April 11, 2016.
Feb 9 2016	The time to file respondents' briefs on the merits is extended to and including June 10, 2016.
Mar 21 2016	Consent to the filing of timely amicus curiae briefs in support of either party or of neither party received from counsel for respondent St. Croix County.
Mar 22 2016	Consent to the filing of timely amicus curiae briefs in support of either party or of neither party received from counsel for respondent Wisconsin.
Apr 6 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Apr 11 2016	Joint appendix filed. (Statement of costs filed)
Apr 11 2016	Brief of petitioners Joseph P. Murr, et al. filed.

Apr 15 2016	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Apr 18 2016	Brief amicus curiae of Wisconsin Realtors Association filed.
Apr 18 2016	Brief amici curiae of Southeastern Legal Foundation, and the Beacon Center filed.
Apr 18 2016	Brief amici curiae of California Cattlemen's Association, et al. filed.
Apr 18 2016	Brief amici curiae of National Association of Home Builders, et al. filed.
Apr 18 2016	Brief amicus curiae of New England Legal Foundation filed.
Apr 18 2016	Brief amicus curiae of Reason Foundation filed.
Apr 18 2016	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Apr 18 2016	Brief amici curiae of Cato Institute, and Owners' Counsel of America filed.
Apr 18 2016	Brief amicus curiae of Mountain States Legal Foundation filed.
Apr 18 2016	Brief amici curiae of Nevada, et al. filed.
Jun 10 2016	Brief of respondent Wisconsin filed.
Jun 10 2016	Brief of respondent St. Croix County filed.
Jun 14 2016	Brief amici curiae of Property Law Professors filed.
Jun 14 2016	Application (15A1265) to extend the time to file a reply brief from July 11, 2016 to July 29, 2016, submitted to Justice Kagan.
Jun 16 2016	Brief amici curiae of Carlisle Ford Runge, et al. filed.
Jun 16 2016	Brief amici curiae of American Planning Association, and Wisconsin Chapter of the American Planning Association filed.
Jun 16 2016	Motion for divided argument filed by respondent St. Croix County.
Jun 16 2016	Motion for divided argument filed by respondent Wisconsin.
Jun 17 2016	Brief amici curiae of National Association of Counties, et al. filed.
Jun 17 2016	Brief amicus curiae of United States filed.
Jun 17 2016	Brief amicus curiae of National Trust for Historic Preservation filed.
Jun 17 2016	Brief amici curiae of California, et al. filed.
Jun 17 2016	Brief amici curiae of Walter F. Mondale, et al.
Jun 17 2016	Brief amici curiae of The Wisconsin Counties Association, et al. filed.
Jun 17 2016	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae, and for divided argument filed.
Jun 20 2016	Application (15A1265) granted by Justice Kagan extending the time to file petitioners' reply brief on the merits until July 29, 2016.
Jul 27 2016	Reply of petitioners Joseph P. Murr, et al. filed.
Oct 3 2016	Motion for divided argument filed by respondent St. Croix County GRANTED.
Oct 3 2016	Motion for divided argument filed by respondent Wisconsin GRANTED.
Oct 3 2016	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. and the time is divided as follows: 35 minutes for petitioners, 15 minutes for respondent Wisconsin, 10 minutes for respondent St. Croix County, and 10 minutes for the Solicitor General.
Jan 20 2017	Motion of Nevada, et al. out of time for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 3 2017	SET FOR ARGUMENT on Monday, March 20, 2017
Feb 3 2017	Record requested from the Court of Appeals of Wisconsin, District III.
Feb 9 2017	CIRCULATED.
Feb 21 2017	Motion of Nevada, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Feb 22 2017	Record received from the St. Croix County Circuit Court, Wisconsin (1 box).
Mar 20 2017	Argued. For petitioners: John M. Groen, Sacramento, Cal. For respondent Wisconsin: Misha Tseytlin, Solicitor General, Madison, Wisconsin. For respondent St. Croix County:

	Richard J. Lazarus, Cambridge, Mass. For United States, as amicus curiae, in support of respondents: Elizabeth B. Prelogar, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Apr 14 2017	Record received from the Court of Appeals of Wisconsin, District III. The record is electronic.
Jun 23 2017	Adjudged to be AFFIRMED. Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined. Thomas, J., filed a dissenting opinion. Gorsuch, J., took no part in the consideration or decision of this case.
Jul 25 2017	MANDATE ISSUED.
Jul 25 2017	JUDGMENT ISSUED.

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No. 15-214

In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

LIST OF ALL PARTIES

The parties to the proceeding are Petitioners Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver. The Respondents are the State of Wisconsin and St. Croix County.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies in this case.

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PETITION FOR WRIT OF CERTIORARI

Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Wisconsin.

OPINIONS BELOW

The decision below of the Court of Appeals of Wisconsin is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). The opinion is reproduced in the Appendix at A-1.

The decision of the Circuit Court of St. Croix County is unreported and is reproduced in the Appendix at B-1.

The order of the Wisconsin Supreme Court denying a Petition For Review was issued April 16, 2015, and is reproduced in the Appendix at C-1.

JURISDICTION

The date of the decision sought to be reviewed is December 23, 2014. The Wisconsin Supreme Court denied further review on April, 16, 2015. On June 30, 2015, this Court entered an order extending the time for filing a petition for writ of certiorari to and including August 14, 2015.

Jurisdiction is conferred under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III. V, Lower St. Croix Riverway Overlay Dist. § 17.36 I.4.a. It is reproduced verbatim, in relevant part, in the Appendix at D-1. This ordinance is based on Wis. Admin. Code § NR 118.08(4).

STATEMENT OF THE CASE

For approximately 125 miles, the St. Croix River forms the boundary between Minnesota and Wisconsin. About 12 miles east of St. Paul, the river widens and is referred to as Lake St. Croix. Accessed directly by Interstate 94, Lake St. Croix is a popular recreation area. The lake has beautiful beaches and numerous homes along its shores. The lake boasts many recreational facilities, including city parks, a county park, a state park, various private resorts and marine facilities, and at least 10 boat access points. The area is part of the Minneapolis-St. Paul Metropolitan Statistical Area and has a large nearby population base.

On the Wisconsin lakeshore sits the City of Hudson, and just a few miles south is the Town of Troy. There, the lake features a large cove with over 40 waterfront parcels, appropriately known as the St. Croix Cove Subdivision. This is where the subject properties, referred to as Lot E and Lot F, are located.

A. Factual Background

The Petitioners are Donna Murr, Joseph Murr, Michael Murr, and Peggy Heaver (collectively, the Murrs). They are siblings. In 1960, their parents purchased Lot F. This lot was created by a Certified Survey Map and recorded on July 21, 1959.

Lot E sits adjacent to Lot F. Both are waterfront parcels approximately 100 feet wide, and over one acre in size. Lot E was also created by a Certified Survey Map and recorded 6 days later, on July 27, 1959.

There is no dispute that as originally created, each parcel was a separate and distinct legal lot, and each was allowed to be separately developed, used, and sold.

The Murrs' father was a plumber and he ran his own business, William Murr Plumbing, Inc. He was advised by his accountant to place title to Lot F in that business entity, which he did. Soon after purchasing Lot F, the Murrs' parents built a three bedroom recreational cabin, approximately 950 square feet. And so began a family legacy of enjoying many summers, long weekend holidays, birthdays, and 4th of July celebrations at the lake. Of course, the siblings grew up. They started their own families and soon the next generation of kids were enjoying the lakeside cabin. For the Murr family, the cabin has been the family gathering place.

The Murrs' parents had foresight. Recognizing the long-term potential of the area, they decided in 1963 to purchase a second parcel, the above-mentioned Lot E. Lot E has remained vacant and undeveloped to this day, but not so for the rest of the St. Croix Cove Subdivision. Almost all of the other waterfront parcels have been developed with homes and most are occupied year round by full-time residents.

Title to Lot E was in the Murrs' parents own names, rather than the plumbing company. There is no dispute that they bought this adjacent parcel for investment purposes. When the investment ripened, they planned to develop it separately from Lot F, or sell it to a third party.

In 1994, the parents transferred title to Lot F with the cabin to their six children. This was a gift to all of them; a way to keep the family legacy intact. In 1995, the investment Lot E was also transferred to the children; also a gift. Subsequently, two of the children quitclaimed their interests to their four siblings, again without any exchange of money. These four siblings are the current owners and the parties to this action.

In 2004, the Murr siblings began exploring the possibility of upgrading the cabin, including elevating it to diminish the threat of flood. They planned to sell investment Lot E, and use the proceeds from the sale to fund their project. It was then that they learned from government officials that they could no longer separately develop and sell Lot E.

Development of Lot E was precluded by regulations adopted in 1975 that required a "net project area" of at least one acre. Lot E is approximately 1.25 acres in overall size, but the

ordinance requires subtracting areas for slope preservation zones, floodplains, road rights-of-way, and wetlands, thereby yielding a net project area for development of Lot E of 0.5 acres.[1] But this half acre project area is not enough under the ordinance. There is no dispute that the remaining half acre has a suitable building site for a single family residence that meets the setback requirements. Nevertheless, because of the "net project area" deductions imposed by government, the parcel no longer meets the zoning requirements.

In short, when Lot E was created in 1959, and purchased in 1963, it was of sufficient size, width, and zoning to allow development of a single family house. Indeed, that is the use allowed for all the parcels within the St. Croix Cove Subdivision. However, because of the restrictions that came into place in 1975, the parcel was now defined as "substandard."

Despite being defined as substandard, Lot E would still be allowed to be developed if it was owned by *anyone other than the Murr siblings*. Under the ordinance, a grandfather clause provides that any lot created prior to January 1, 1976, as was Lot E, may still be developed as a single family residence *but only if* the lot "is in separate ownership from abutting lands."[2] Of course, the Murrs own the abutting parcel, Lot F. Because the Murrs own both parcels, this grandfather exception does not apply to them. Had

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[1] Lot F also had a similar net project area of .48 acres. Accordingly, it was also defined as substandard under the 1975 regulations.

[2] St. Croix County Code of Ordinances, § 17.36 I.4.a.1 (Appendix at D-1).

anyone else owned Lot E, that owner would be allowed to build a single family residence. Regrettably, the ordinance also precludes the Murrs from selling Lot E to anyone else unless it is combined with Lot F.[3]

B. Procedural Background

The Murrs sought relief from the ordinance by seeking a variance to allow using Lot E as a separate building site. They argued that on January 1, 1976, the lots were still in separate ownerships (split between the plumbing company and the Murrs' parents), and therefore the grandfather clause should apply. The County Board of Adjustment rejected that interpretation of the ordinance, and upon judicial review, the Wisconsin Court of Appeals affirmed. As stated in the decision below:

> In *Murr v. St. Croix County Board of Adjustment*, 2011 WI App 29, ¶¶ 1-2, 332 Wis.2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.

App. at A-2 ¶ 2. The Wisconsin Supreme Court subsequently denied review. App. at A-5 ¶ 7.

Having exhausted their administrative remedies and after receipt of a final decision denying relief, the Murrs filed a complaint alleging an uncompensated taking of vacant Lot E. They contend that without the ability to sell or develop the lot, it is rendered economically useless. The Murrs contended below that

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[3] *Id.* § 17.36 I.4.a.2 (Appendix at D-1).

the situation parallels the facts of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (denial of all economically viable use is a taking).

C. The Wisconsin Court Rejects a Categorical Taking by Defining the Relevant Parcel as Including Both Lots E and F

The Wisconsin Court of Appeals applied federal takings law to reject the Murrs' claim for compensation.[4] The analysis begins with the recognition that the "federal and state constitutions do not prohibit the taking of private property for public use, but they do require that government provide just compensation for any taking." App. at A-7 ¶ 13. In footnote 7, the court quoted the Fifth Amendment's Takings Clause and noted its similarity to the Wisconsin constitutional provision. *Id.*

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[4] The Murrs presented their claim under the state constitutional provision, however, the Wisconsin Court of Appeals determined the takings analysis based on federal takings law, and most particularly this Court's decision in *Penn Central*. Where the state court of last resort *actually determines* a federal question, it does not matter whether the federal claim was properly before it in order to confer jurisdiction under 28 U.S.C. § 1257. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). It is enough that the state court reached and decided the federal question, as though properly raised. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). Under these circumstances, the Court has recognized jurisdiction, including in takings cases. *See*, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (taking claim raised under the Florida Constitution but general ruling of no unconstitutional taking was sufficient basis for Supreme Court consideration of the federal issue). *See generally* Stephen M. Shapiro, Supreme Court Practice § 3.19 (10th Ed., 2013).

Turning to the merits, the Wisconsin court recognized that defining the relevant parcel was central to analyzing the taking claim. The Murrs argued that the relevant parcel for takings purposes is investment Lot E, and only Lot E. They did not include any claim for a taking of Lot F. In contrast, the government defendants argued that for purposes of analyzing whether there was a denial of all economically viable use, the relevant parcel was Lot E *combined with* Lot F.

The Wisconsin appellate court ruled that because the two lots are contiguous, and happen to be owned by the same people, this Court's "parcel as a whole" rule from *Penn Central* requires combining the two parcels for takings analysis. As stated below:

> "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole** . . . .'" (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

App. at A-10 ¶ 18 (quoting *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996) (emphasis added).

The Murrs argued that they had been deprived of at least one of their two separate and discrete parcels. From their perspective, these were two separate parcels, created as legally separate lots, taxed

separately, and purchased separately. The lots were never developed together, and were purchased for completely different reasons. But because the Murrs owned both parcels, the Wisconsin court ruled that together, these two parcels combined were the Murrs' "parcel as a whole." This conclusion was driven by the contiguous ownership.

> [T]he Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, **contiguousness is the key fact** . . . .

App. at A-10 ¶ 19 (emphasis added). The court repeated again that the Supreme Court of the United States "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." Accordingly, the court below concluded by proclaiming

> a well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

App. at A-11 ¶ 20 (emphasis added).

Given this analysis of *Penn Central*, it was very easy for the Wisconsin court to find there was no taking as a matter of law.

> With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a

> single, buildable lot under the ordinance. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes.

App. at A-12 ¶ 22.[5] Of course, as will be shown below, the "rule" that the Wisconsin court derives from *Penn Central* strikes a resounding gong highlighting the significant conflict that has developed among the state and federal courts concerning the "parcel as a whole" issue.

Based on this rationale, the court below concluded that "the Murrs' property, viewed as a whole, retains beneficial and practical use as a residential lot." App. at A-18 ¶ 31. The court concluded as a matter of law that the Murrs have not alleged a compensable taking. *Id.*

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[5] Under the ordinance, the Murrs were allowed to build on Lot E, or retain the cabin on Lot F, but not both. They could build on Lot E only "if they choose to raze the cabin." App. at A-12 ¶ 22.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

THE "PARCEL AS A WHOLE" CONCEPT PRESENTS A CRITICAL ISSUE OF FEDERAL TAKINGS LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. Determining the Relevant Parcel Is a Critical Issue That Controls the Outcomes of Many Takings Claims

Under either the *Lucas* categorical taking for denial of all economically viable use, or the *Penn Central* ad hoc, multi-factor approach, a court must determine the value and use of the property before and after the application of the restricting ordinance. But in order to measure the lost value, a unit of property must be determined to be the denominator in that calculation. This Court recognizes this is a "critical question[]" in the takings analysis.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the **critical questions** is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 496 (1987) (quoting Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (emphasis added)). The Federal Circuit likewise explained:

> In many cases, as here, the definition of the relevant parcel of land is a **crucial antecedent** that determines the extent of the economic impact wrought by the regulation.

Lost Tree Village Corporation v. United States, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (emphasis added). In takings involving parcels of land, this legal question is confronted in practically every case.

> Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into economic impact of the regulation on the claimant and on investment backed expectations. The relevant parcel determination is a question of law based on underlying facts.

Lost Tree Village, 707 F.3d at 1292.

B. This Court Recognizes the "Parcel as a Whole" Concept Has Been Inadequately Developed, and Requires Supreme Court Guidance, Yet the Court Has Been Unable to Reach the Issue in Previous Takings Cases

Fifth Amendment jurisprudence is greatly lacking in determining what is the "parcel as a whole." This Court's frustration and discomfort with the existing law has been expressly acknowledged. In *Lucas*, the Court explained:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since it does not make clear the "property interest" against which the loss of value is to be measured.

Lucas, 505 U.S. at 1016 n.7. This has resulted in inconsistent decisions.

> Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id. (comparing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), with *Keystone Bituminous Coal Association v. DeBenedictus*). Despite acknowledging the problem, the facts in *Lucas* did not present the opportunity to address the issue. *Lucas*, 505 U.S. at 1016 n.7.

The Court recognized again its "discomfort" with the "parcel as a whole" rule in *Palazzolo v. Rhode*

Island, 533 U.S. 606 (2001). But again, the circumstances did not allow reaching the issue.

> This contention asks us to examine the difficult, **persisting question** of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the parcel as a whole; but we have at times expressed **discomfort with the logic of this rule**, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Id. at 631 (citations omitted; emphasis added).

One of the critiquing commentators expressly cited in *Palazzolo* is John Fee, whose article in the University of Chicago Law Review is recognized as a significant work in its effort to point the Court in a logical direction for addressing the relevant parcel question. *Palazzolo*, 533 U.S. at 631 (citing John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994). In his opening paragraphs to describe the problem, John Fee presents the classic hypothetical that mirrors exactly the facts of the case presented by the Murr family in this petition. The Murrs own two side-by-side lots, one that is restricted and not allowed to be independently developed and sold, and the other with long-standing residential use. Matching that description, the Fee article explains:

> What the Court [in *Lucas*] did not decide, however, is how to determine the relevant parcel of land that is subject to the regulatory taking inquiry. Suppose, for instance, that only one of Lucas's two parcels were subjected to the government regulation. Would there have been a taking of only that parcel? Or would the Court have analyzed the effect of the regulation on the two lots combined, finding that—because some beneficial use remained for the property as a whole—no taking had occurred?

Fee, 61 U. Chi. L. Rev. at 1535-36. That is precisely the factual context of this petition. The importance of the issue is well recognized, and the time and circumstances are ripe for this Court to finally address the issue.

C. The Factual Context Presented in This Petition Is Ideal for Providing Practical Guidance to the Relevant Parcel Question and How the "Parcel as Whole" Concept Is to Be Applied

This petition provides the Court with the best factual context for developing the parcel as a whole jurisprudence. First, and most important, the case involves land, traditional parcels, and common residential lots. Furthermore, the alleged taking is not of an unusual property interest. This is in contrast to cases such as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), where, in the context of a moratorium that only temporarily precluded all use, the plaintiff argued for a taking of a "temporal slice" of the fee interest. The petitioners' "conceptual severance" argument was

unpersuasive, as the Court relied on the parcel as a whole concept to reject dividing the property into temporal segments. *Id.* at 331. While important, such precedent does not answer the far more common and persistent problem facing the Murr family.

Similarly, *Andrus v. Allard*, 444 U.S. 51 (1979), has little bearing on most property owners. There, a prohibition on commercial transactions in eagle feathers was not a taking. The Court would not divide the property interest into discrete segments, and affirmed that "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking." *Id.* at 65-66. In contrast, the Petitioners here allege a taking of the entire fee interest of Lot E. The question presented focuses on the problem of contiguous ownership, and that issue, as pointed out by John Fee, has not been answered by this Court, but should be.

Other cases similarly derive from unusual fact patterns. *See*, e.g., *Penn Central* (alleging a taking of air space); *Keystone Bituminous Coal Association* (taking allegation based on requirement that pillars of coal be left in place). In contrast, the factual context here provides the opportunity for understanding how the parcel as a whole concept applies in the typical situation of horizontal divisions of property into lots and parcels where the allegation is a taking of the entire fee interest. This is a question that needs resolution.

> The Supreme Court has thus failed to provide clear guidance to courts on the denominator question—especially in horizontal cases. Not only has the Court never decided a case involving the horizontal

> division of land, but it has failed to define "parcel as a whole." Until this issue is resolved, lower courts will continue to face the crucial question: economically viable use of *what* land?

Fee, 61 U. Chi. L. Rev. at 1545 (italics in original). This case squarely presents that opportunity.

D. State and Federal Courts Are in Substantial Conflict

In the context of actual land (as contrasted with air space, temporal segmentation, or cases involving merely a strand in the bundle of rights), the federal and state courts have been left without clear guidance from this Court on when to aggregate parcels for takings analysis. Not surprisingly, the result has been inconsistent and contradictory approaches.

On one extreme, the Wisconsin court below focused on contiguity as the "key fact" and held that the *Penn Central* "parcel as a whole" concept establishes a "rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20. Michigan is similar. *See Bevan v. Brandon Township*, 475 N.W.2d 37, 43 (Mich. 1991) (despite division into separate, identifiable lots, the court ruled that "contiguous lots under the same ownership are to be considered as a whole").

Not willing to go that far, the Massachusetts Supreme Court did not establish a "rule" based on commonly owned contiguous property, but instead viewed those facts as establishing a rebuttable presumption for defining the parcel as a whole.

> We conclude that the extent of contiguous commonly owned property gives rise to a rebuttable presumption defining the relevant parcel.

Giovanella v. Conservation Commission of Ashland, 857 N.E.2d 451, 458 (Mass. 2006). That court based its presumption on a view of common sense. "Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property." *Id.* But the court also confessed that such a rule is "the most easily measured." *Id.*

In sharp conflict, Florida makes the opposite presumption. There, adjoining lots created under the state laws are presumed to be separate.

> [W]e believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence.

Department of Transportation, Division of Administration v. Jirik, 498 So. 2d 1253, 1257 (Fla. 1986). That court had a different view of common sense, pointing out instead that the formal process of subdividing lots should not so easily be disregarded by government in defending takings claims. *Id.*

> Furthermore, an owner of platted city lots cannot easily abandon or disregard formally established divisions because planning boards, city commissions, and other governmental entities must approve such decisions.

Id. The court concluded, "We therefore hold that vacant city property constitutes presumptively separate units if platted into lots." *Id.* If the Murrs were in Florida, they likely would have received compensation for the taking of Lot E.

Idaho and Ohio also are more likely to treat separate parcels separately. *See City of Coeur d'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006) (reversing trial court decision that aggregated two contiguous parcels); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (approximately 100 acres outside of the regulated area was not included in the relevant parcel even though it was contiguous and commonly owned).

Similar division is found among the federal courts. The D.C. Circuit Court of Appeals combined nine separate parcels under common ownership for takings analysis in *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999). The concurrence pointed out:

> The majority applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis. This presumption tends to reduce the likelihood that courts will order compensation.

Id. at 885 (Williams, J., concurring). But the majority responded to this criticism by pointing out, "Unless and until the [Supreme] Court instructs otherwise, we are obliged to judge within the bounds of established precedent." *Id.* at 882. Of course, the problem is the differing views of just what is the established precedent with regards to the parcel as a whole.

Other federal courts do not view common ownership as creating a presumption of aggregation.

> Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified. The trial court's conclusion to the contrary was error.

Palm Beach Isles Associates v. United States, 208 F.3d 1374, 1381 (Fed. Cir. 2000). *See also American Savings & Loan Association v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (contiguously owned parcels not presumptively aggregated).

In short, the various approaches to treating contiguous, commonly owned properties in defining the relevant parcel is a significant issue that warrants review by this Court. As pointed out by Professor Mandelker,

> The Supreme Court's views on this issue are conflicting, and no principled basis for determining the segmentation of property interests has emerged.

Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9, 16 (1997). The time has arrived for this area of law to finally be addressed.

> Defining the relevant parcel based solely on contiguous common ownership has an advantage in that it is easy to apply. But it does little to serve the policies underlying the Takings Clause. As a standard of just

> compensation, it is simply illogical. Why should the law declare that a landowner may not own more than one adjacent "parcel" of land, each independently protected by the Fifth Amendment? A unity-of-ownership standard, for its simplicity, results in arbitrary treatment of landowners and harmful distortions of real estate markets.

John E. Fee, *Of Parcels and Property, in* Taking Sides on Takings Issues: Public and Private Perspectives 101, 112 (Thomas E. Roberts, ed. 2002). The arbitrariness of such a rule is evident in the present case where if *any person other than the Murrs* owned Lot E, that owner would be able to construct a home under the grandfather clause in the ordinance. It is only the Murrs, as the abutting owners, who are forced into the merger of these otherwise discrete and separate lots. This significant issue warrants review.

> How to define the horizontal boundaries of land for purposes of determining whether there is a regulatory taking—the very issue the Court dodged in *Palazzolo*—is perhaps the **most significant unresolved question** [concerning the Takings Clause].

Id. at 102 (emphasis added). The present case provides the opportunity that was absent in *Palazzolo* and *Lucas*.

CONCLUSION

The time and opportunity has arrived for this Court to finally resolve a persistent and key issue in regulatory takings law. The "parcel as a whole" concept has never been applied by this Court to a horizontal division of a fee interest in land. Yet, this factual context will be most useful to lower federal and state courts. For all the reasons expressed, it is urged that the petition for writ of certiorari be granted.

DATED: August, 2015.

Respectfully submitted,

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COURT OF APPEALS DECISION

DATED AND FILED
December 23, 2014

Appeal No. 2013AP2828 Cir. Ct. No. 2012CV258

STATE OF WISCONSIN **IN COURT OF APPEALS**

DISTRICT III

JOSEPH P. MURR, MICHAEL W. MURR, DONNA J. MURR AND PEGGY M. HEAVER,

PLAINTIFFS-APPELLANTS,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:

SCOTT R. NEEDHAM, Judge. Affirmed.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Joseph Murr, Michael Murr, Donna Murr and Peggy Heaver (collectively, the Murrs) appeal a judgment dismissing their regulatory takings claim upon motions for summary judgment by the State of Wisconsin and St. Croix County. We agree with the circuit court that the challenged regulatory action, an ordinance that effectively merged the Murrs'

two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property. Accordingly, we affirm.

BACKGROUND

¶2 This appeal represents the second time the Murrs' dispute with the County over the use of their property has come before this court. In ***Murr v. St. Croix County Board of Adjustment***, 2011 WI App 29, ¶¶1-2, 332 Wis. 2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.[1]

¶3 Our earlier opinion sets forth the history of the property, which we briefly restate here. Furthermore, as this is an appeal from a decision granting summary judgment against the Murrs, we view all pertinent facts and reasonable inferences from those facts in the light most favorable to the Murrs. *See* ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

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[1] Donna Murr was the only named party in the previous suit. *See* ***Murr v. St. Croix Cnty. Bd. of Adjustment***, 2011 WI App 29, ¶4 n.4, 332 Wis. 2d 172, 796 N.W.2d 837. Her interests are aligned with those of her siblings in the present matter, so for ease of reading we will refer to the Murrs collectively in our recitation of the facts pertaining to the earlier suit.

In addition, our previous decision did not specifically identify the lots using the "E" and "F" nomenclature. The Murrs represent this nomenclature comes from an unrecorded subdivision map. For ease of reading, we will supplement the statement of facts in our earlier opinion with the appropriate designation.

¶4 The Murrs' parents purchased Lot F in 1960. ***Murr***, 332 Wis. 2d 172, ¶4. They built a cabin near the river and transferred title to their plumbing company. ***Id.*** In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which has remained vacant ever since. ***Id.*** The Murrs allege Lot E was purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party.

¶5 The lots have a common topography. Each is bisected by a 130-foot bluff, but they are moderately level at the top and near the river. ***Id.*** Together, the lots contain approximately .98 acres of net project area.[2] ***Id.*** The Murrs' parents transferred Lot F to the Murrs in 1994, followed by Lot E in 1995.[3] ***Id.***

¶6 The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE & DEV., Subch. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DIST. § 17.36I.4.a. (July 1, 2007) (the Ordinance), which has been in place since the mid-1970s. *See* ***State v. St. Croix Cnty.***, 2003 WI App 173, ¶4, 266 Wis. 2d 498, 668 N.W.2d 743. The Ordinance prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an

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[2] "Net project area" means "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." WIS. ADMIN. CODE § NR 118.03(27) (Feb. 2012).

[3] Although not material to our decision because ownership was at all times common, we note that the Murrs' parents conveyed the contiguous properties to two other siblings in addition to the Murrs. The record indicates those siblings subsequently quitclaimed their ownership interests to the Murrs.

individual lot has at least one acre of net project area.[4] However, if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot. ***Murr***, 332 Wis. 2d 172, ¶11 n.9.

¶7 Years later, after repeated flooding, the Murrs decided to flood proof the cabin on Lot F and sell Lot E as a buildable lot. Among other things, the Murrs sought a variance to separately use or sell their two

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[4] As set forth in our earlier decision, the Ordinance reads:

> **(4) SUBSTANDARD LOTS** Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

Murr, 332 Wis. 2d 172, ¶10 & n.8 (noting that the Ordinance's internal paragraph lettering and numbering is illogical and potentially confusing, such that use of lettering and numbering of the administrative code provision on which the Ordinance is based, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), is more appropriate). As we previously noted, the administrative code provision is "not a model of clear draftsmanship," and we renew our call, implicit in our previous decision, for the DNR to review its language. *See id.*, ¶11.

contiguous lots. ***Id.***, ¶5. The DNR and county zoning staff opposed the Murrs' application and, following a public hearing, the St. Croix County Board of Adjustment denied the application. ***Id.***, ¶6. The Murrs sought certiorari review and the circuit court affirmed the portion of the Board's decision relevant to this appeal. ***Id.*** On appeal, we agreed with the circuit court that the Board acted appropriately. ***Id.***, ¶2. The Wisconsin Supreme Court denied the Murrs' subsequent petition for review.

¶8 The Murrs then filed a complaint against the State and County pursuant to WIS. STAT. § 32.10,[5] alleging that the Ordinance resulted in an uncompensated taking of their property under WIS. CONST. art. I, § 13.[6] The Murrs alleged that the Ordinance and the administrative code provision on which it was patterned, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), deprived them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." They asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain. Finally, they alleged the lot was usable only for a single-family residence, "and without the ability to sell or develop it the lot is rendered useless."

¶9 The State and County separately sought summary judgment. Their motions essentially advanced the

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[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[6] The Murrs represented they had served the State and County with a Notice of Claim that demanded compensation for the taking of their land. The County denied the claim by letter dated October 3, 2011. The State did not issue a denial, but the claim was deemed denied due to the passage of time.

same arguments: the Murrs' claim was time barred; the Murrs failed to exhaust their administrative remedies; they had no protectable property right to sell a portion of their property; and they were not deprived of all or substantially all the beneficial use of their property.

¶10 The circuit court granted summary judgment to the County and State. The court first concluded the Murrs' claim was time barred, reasoning that the Ordinance "had immediate economic consequence[s]" when it was enacted. Despite this conclusion, the court also reached the merits of the Murrs' claim. It determined that the applicable law required it to analyze the effect of the Ordinance on the Murrs' property as a whole, not each lot individually. Accordingly, the court held there was no taking because the Murrs' property, taken as a whole, could be used for residential purposes, among other things. Specifically, the court noted the undisputed fact that, even under the Ordinance, "[a] year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." Further, the court determined the Murrs' property—again, defined as Lots E and F combined—retained significant value, citing an appraisal opining that the merger decreased the property value by less than ten percent. The court denied a subsequent motion for reconsideration, and the Murrs now appeal.

DISCUSSION

¶11 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is

appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). As the moving parties, the County and the State must show a defense that would defeat the Murrs' claim. *See* ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

¶12 The Murrs argue the circuit court erred for two reasons. First, they assert their claim is not time barred. They reason their claim was not ripe until their request for a variance was denied and they exhausted their appellate rights from that decision. Second, the Murrs argue the Ordinance deprived them of all, or substantially all, beneficial use of their property. We conclude the Murrs' takings claim fails on its merits as a matter of law. Accordingly, we do not reach the issue of whether their claim was timely filed and assume, without deciding, that it was. *See* ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶2, 310 Wis. 2d 230, 750 N.W.2d 492 (citing ***Gross v. Hoffman***, 227 Wis. 296, 299-300, 277 N.W. 663 (1938)) (where one issue is dispositive, we need not address other issues).

¶13 The federal and state constitutions do not prohibit the taking of private property for public use, but they do require that the government provide just compensation for any taking. ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372.[7] "A 'taking' need not arise from an actual physical

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[7] The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, (continued...)

occupation of land by the government." ***Eberle v. Dane Cnty. Bd. of Adjustment***, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999). A "taking" can also occur if the government enacts a regulation "that is 'so onerous that its effect is tantamount to a direct appropriation.'" ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶22, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting ***Lingle v. Chevron U.S.A. Inc.***, 544 U.S. 528, 537 (2005)). The Murrs allege the latter type of taking—a regulatory or constructive taking—occurred here. Whether the Ordinance constituted a taking of the Murrs' property without compensation is a question of law. *See* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996).

¶14 A landowner who believes the government has taken his or her property without instituting formal condemnation proceedings may bring an inverse condemnation claim under WIS. STAT. § 32.10 to recover just compensation. *See* ***E-L Enters.***, 326 Wis. 2d 82, ¶36. That statute, which is the legislative fulfillment of WIS. CONST. art. I, § 13, is, by its terms, designed solely to deal with the traditional exercise of the government's eminent domain power vis-à-vis physical occupation. ***E-L Enters.***, 326 Wis. 2d 82, ¶36. However, our supreme court has concluded regulatory takings are also cognizable under § 32.10. *See* ***E-L Enters.***, 326 Wis. 2d 82, ¶37.

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[7] (...continued)
"mandates that private property shall not be taken for public use, without just compensation.'" ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372 (quoting U.S. CONST. amend. V). Similarly, the Wisconsin Constitution prohibits the taking of private property "'for public use without just compensation therefor.'" ***Id.*** (quoting WIS. CONST. art. I, § 13).

¶15 The landmark case in this respect was ***Howell Plaza, Inc. v. State Highway Commission***, 66 Wis. 2d 720, 226 N.W.2d 185 (1975). There, the court concluded "that there need not be an actual taking in the sense that there be a physical occupation or possession by the condemning authority . . . ." ***Id.*** at 730. To state a claim under WIS. STAT. § 32.10 in the absence of physical occupation, the facts alleged must demonstrate that a government restriction "deprives the owner of all, or substantially all, of the beneficial use of his property." ***Id.*** at 726; *see also* ***E-L Enters.***, 326 Wis. 2d 82, ¶37.

¶16 Here, the Murrs seek compensation solely for the alleged taking of Lot E. They contend that, given the application of the Ordinance, Lot E "serves no purpose or use" and has no value because it "cannot be sold." The Murrs argue the circuit court erred by examining the beneficial uses of Lots E and F in combination. Instead, citing ***Jonas v. State***, 19 Wis. 2d 638, 121 N.W.2d 235 (1963), and ***Lippert v. Chicago & Northwestern Railway Co.***, 170 Wis. 429, 175 N.W. 781 (1920), the Murrs contend there is a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis.

¶17 Contrary to the Murrs' assertions, the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled in ***Zealy***. There, our supreme court concluded that before considering whether a regulatory taking has occurred, "a court must first determine what, precisely, is the property at issue . . . ." ***Zealy***, 201 Wis. 2d at 375. The landowner in ***Zealy*** argued the City of Waukesha accomplished a regulatory taking by

creating a conservancy district over 8.2 acres of his 10.4-acre parcel, thereby precluding residential development on the majority of the property. ***Id.*** at 370-71. The court, however, rejected the owner's attempt to so segment the property, concluding a "landowner's property in such a case should be considered as a whole." ***Id.*** at 376. Because the landowner retained over two acres zoned for business and/or residential use, and farming was permitted within the conservancy district, no compensable taking occurred. ***Id.*** at 378-80.

¶18 In so holding, the court credited both the Supreme Court's historical formulation of the takings inquiry and practical considerations. "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." ***Id.*** at 375-76. Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .'" ***Id.*** at 376 (quoting ***Penn Cent. Transp. Co. v. New York City***, 438 U.S. 104, 130-31 (1978)). This analysis preserves a municipality's authority to place reasonable limits on the use of property without requiring the payment of compensation for every incidental infringement of property rights. *See* ***id.*** (quoting ***Keystone Bituminous Coal Ass'n v. DeBenedictis***, 480 U.S. 470, 498 (1987)).

¶19 The Murrs contend ***Zealy*** is distinguishable because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no

dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguousness is the key fact under ***Zealy***. *See* ***Zealy***, 201 Wis. 2d at 375-76 (observing the Supreme Court "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ."). This is evident from our supreme court's subsequent decision in ***R.W. Docks & Slips v. State***, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781. There, a developer partially completed a marina and condominiums but the DNR, noting an emergent weedbed along the shoreline, refused to grant a permit for the dredging necessary to complete the remaining 71 boat slips. ***Id.***, ¶¶8-9. Applying ***Zealy***, the court held that the developer's subsequent takings claim must be analyzed "in light of the marina as a whole rather than the parcel that was to have contained the 71 boat slips." ***Id.***, ¶27.

¶20 Neither ***Jonas*** nor ***Lippert***, the authorities on which the Murrs rely, cast any doubt upon what has become a well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein. *See* ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶¶25-27 & n.5 (reaffirming ***Zealy*** and declining to revisit the issue). ***Jonas*** and ***Lippert*** both involved formal condemnation proceedings; they were not regulatory takings cases. *See* ***Jonas***, 19 Wis. 2d at 639; ***Lippert***, 170 Wis. at 429-30. As such, the issue was not whether there had been a taking but rather the amount of compensation due.

¶21 When properly viewed as valuation cases, it becomes clear ***Jonas*** and ***Lippert*** are inapplicable. The property owners in those cases argued they were

entitled to "severance" damages—an amount representing diminutions in the value or use of other property attributable to the loss of the condemned property. *See* ***Jonas***, 19 Wis. 2d at 642; ***Lippert***, 170 Wis. at 430-32. The availability of such damages turns on "[u]nity of use," a concept which assesses whether the properties "are used as a unit so that each is dependent and related to the use of the other, or [whether they are] . . . devoted to separate and distinct uses, so as to constitute independent properties." *See* ***Jonas***, 19 Wis. 2d at 642; ***Lippert***, 170 Wis. at 431-32; *see also* ***Spiegelberg v. State***, 2006 WI 75, ¶14, 291 Wis. 2d 601, 717 N.W.2d 641 ("The unity of use rule permits a condemnee to receive compensation when a taking from one property must be considered in terms of its effect on another property, in order for those affected . . . to be fully compensated."); ***Bigelow v. West Wis. Ry. Co.***, 27 Wis. 478, 487 (1871). Nothing to which the Murrs have directed our attention persuades us the unity of use concept should be applied to determine whether a regulatory taking has occurred in the first instance.

¶22 With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a single, buildable lot under the Ordinance. *See* ***Murr***, 332 Wis. 2d 172, ¶11 n.9. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes. Specifically, the Ordinance allows the Murrs to build a year-round residence on top of the bluff, if they choose to raze their cabin located near the river. Notably, this use may include Lot E, as the new residence could be located entirely on Lot E, entirely on Lot F, or it could straddle

both lots. The Murrs' ability to use Lot E for residential purposes, standing alone, is a significant and valuable use of the property. *See* ***Palazzolo v. Rhode Island***, 533 U.S. 606, 631 (2001) (regulation permitting a landowner to build a substantial residence does not leave property economically idle under the Takings Clause). Accordingly, the Murrs have not been denied "all or substantially all practical use[]" of their parcel. ***Zealy***, 201 Wis. 2d at 374.

¶23 The Murrs, at least implicitly, acknowledge that they could locate a residence on Lot E if they so choose. However, they then focus on what Lot E cannot be used for. The Murrs point to deposition testimony indicating Lot E is unsuitable for use in wildlife conservation, agriculture or forestry. In framing the issue in this way, the Murrs ignore the applicable test. We are not concerned with what uses are prohibited or what are the "highest and best uses," but rather only what use or uses remain. *See* ***Zinn v. State***, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983) (taking occurs when a restriction placed on the property practically or substantially renders the property useless for all reasonable purposes).

¶24 "Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." ***Keystone Bituminous Coal Ass'n***, 480 U.S. at 498. The critical question is whether the property owner has been denied "all or substantially all practical uses of [the] property. . . ." ***Zealy***, 201 Wis. 2d at 374. Here, as in ***Zealy***, the "extent of the parcel at issue . . . is clearly identified, and just as clearly the parcel retains substantial uses." ***Id.*** at 380.

¶25 The Murrs obliquely suggest that even if their property has not suffered a loss of all or substantially all its practical use, they are nonetheless entitled to compensation because a partial taking has occurred. In addition to the "categorical" takings analysis, set forth above, courts also use an "ad hoc factual, traditional takings inquiry" that analyzes the "nature and character of the governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶17.

¶26 With respect to the nature and character of the government action, when a property owner does "not suffer the loss of substantially all of the beneficial uses of his land," we need not consider whether the regulation advances a legitimate state interest. ***Zealy***, 201 Wis. 2d at 380-81. In any event, the Murrs do not contend the County lacked a valid public purpose for enacting the Ordinance. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Indeed, in our earlier decision regarding the Murrs' property, we observed that the Ordinance is part of a federal and state effort to protect the "national wild and scenic rivers system," including the Lower St. Croix River. ***Murr***, 332 Wis. 2d 172, ¶10. The Ordinance and similar laws were designed to "preserve property values while limiting environmental impacts." ***Id.***, ¶14.

¶27 To that end, our supreme court's decision in ***Just v. Marinette County***, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), is instructive. There, a shoreland zoning

ordinance established a conservancy district over wetlands within 1,000 feet of a lake and prohibited any filling without a permit. ***Id.*** at 12-14. This, in effect, prevented "the changing of the natural character of the land. . . ." ***Id.*** at 17. The landowner asserted the ordinance was unconstitutional because it amounted toconstructive taking without compensation. ***Id.*** at 14. The court disagreed, finding the ordinance a valid exercise of the police power to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands." ***Id.*** at 10, 14-16. The court emphasized that the owner could still use the land "for natural and indigenous uses," and remarked that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." ***Id.*** at 17. ***Just*** establishes that because of the strong public interest in preventing degradation of the natural environment, property owners advancing takings claims based on environmental legislation have a much more difficult time showing they were deprived of all or substantially all practical use of their property. *See* ***Howell Plaza, Inc. v. State Highway Comm'n***, 92 Wis. 2d 74, 85-86, 284 N.W.2d 887 (1979).

¶28 The Murrs also argue a genuine issue of material fact exists regarding the severity of the Ordinance's economic impact on their property. They contend the degree to which the Ordinance compromised the value of their property is disputed. The Murrs disagree with the circuit court's conclusion that the property decreased in value by less than ten percent when considered as a whole versus as two separate lots.

Rather, the Murrs argue the record includes expert opinions that Lot E is "up to 90% less valuable than land that can be independently developed."

¶29 Any disagreement between experts as to the value of the property does not create a genuine issue of material fact in this case. The Murrs' valuation argument assumes they had an unfettered right to use their land as they pleased at the inception of their ownership. This is not so. The Ordinance was on the books for nearly two decades before the Murrs became the common owners of Lots E and F. This is precisely why we concluded in the Murrs' earlier appeal that any diminution in their property's value occurred at the time they took title to both contiguous lots:

> Because the provisions are already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized.
>
> Further, because Murr is charged with knowledge of the existing zoning laws, *see* ***State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee***, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965), as a subsequent owner she was already in a better position than any person who owned at the [Ordinance's] effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct, saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an

> adjacent lot and merge it into a single more desirable lot.

Murr, 332 Wis. 2d 172, ¶¶16-17. In sum, the Murrs knew or should have known that their lots were "heavily regulated from the get-go." *See* ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶29.

¶30 This reasoning also disposes of the Murrs' assertion that they have always intended Lot E to be developed or sold individually. We regard this as an argument under the factor assessing the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property.[8] The Murrs presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance. Accordingly, even if the Murrs did intend to separately develop or sell Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994.[9] In short, the Murrs "never possessed an

---

[8] While the precise contours of their argument are unclear, to the extent the Murrs are attempting to argue their expectation of separate use should inform the contiguous property rule of ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996), we disagree. A property owner's subjective, desired use is irrelevant to determining the extent of the property at issue for purposes of a regulatory taking. ***See id.*** at 377-78 ("Looking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim.").

[9] In their reply brief, the Murrs argue that ***Palazzolo v. Rhode Island***, 533 U.S. 606 (2001), stands for the proposition that "acquiring land after enactment of a regulation is not fatal to a

(continued...)

unfettered 'right'" to treat the lots separately. *See* ***Murr***, 332 Wis. 2d 172, ¶30.

¶31 Based on the foregoing, we conclude the circuit court properly granted summary judgment in favor of the County and State. The undisputed facts establish that the Murrs' property, viewed as a whole, retains beneficial and practical use as a residential lot. Accordingly, we conclude they have not alleged a compensable taking as a matter of law.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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[9] (...continued)
regulatory takings claim." While that is an arguably accurate recitation of ***Palazzolo***'s holding, it does not benefit the Murrs here. We reject any notion that the Murrs' investment-backed expectations can be used to limit ***Zealy***'s holding regarding how the relevant property is defined. *See* ***Zealy***, 201 Wis. 2d at 375-77. Future generations continue to have the right to challenge unreasonable limitations on the use and value of land, regardless of when the property was purchased. *See* ***Palazzolo***, 533 U.S. at 627-28. This does not mean, however, that they can expect their opinions about the future use of property to affect how the relevant property is defined for purposes of determining whether a regulatory taking has occurred.

STATE OF WISCONSIN CIRCUIT COURT

ST. CROIX COUNTY

JOSEPH P. MURR,
MICHAEL W. MURR,
DONNA J. MURR and
PEGGY M. HEAVER,

Plaintiffs,

-vs-

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

MEMORANDUM DECISION AND ORDER
Case No. 12 CV 258

INTRODUCTION

Plaintiffs (the "Murrs") filed this lawsuit against St. Croix County and the State of Wisconsin alleging a regulatory taking of their property without just compensation. The Murrs own a cabin and 2. 52 acres of land with approximately 15 8 feet of frontage on the St. Croix River. The State and St. Croix County have both moved for summary judgment and an order dismissing the case. The issue on summary judgment is whether the County and State have taken the Murrs' property as a result of a denial of a variance to subdivide and separately sell a portion of their property.

FACTUAL BACKGROUND

This case involves residential property located in St. Croix County along the St. Croix River in the St. Croix Cove Subdivision. The St. Croix Cove Subdivision plat, which was created in the 1950s, identifies the Murrs' property as Lot E and Lot F.

Each lot is approximately 1.25 acres. Lots E and F came under common ownership of the Murrs in 1995 when the Murrs' parents completed a transfer of both lots to their children. The property is moderately level at the top and also below at the river level; however, it is bisected by a steep 130 foot bluff with the top and bottom of the lots being served by separate roads. Lots E and F each have less than 1 acre of building space. Lot F contains a cabin while Lot E remains vacant.

The Murrs' property is regulated by federal, state, county and local regulations. Congress enacted the National Wild and Scenic Rivers Act ("Act") in 1968 to preserve certain rivers for the enjoyment of present and future generations. The Act designates certain rivers as "wild, scenic, or recreational." Wild & Scenic Rivers Act, 16 USCA § § 1271-1287 (1968). Designated rivers are protected by landowners, river users, and through governmental regulations and programs. *Id.* Designation encourages recreation, agricultural practices, and residential development; it does not prohibit development or give the federal government control over private property. *Id.* Congress designated a portion of the St. Croix National Scenic Riverway as "wild, scenic, or recreational" under the Act. *Id.*

Following the designation of the St. Croix River, the Wisconsin Legislature enacted Wis. Stat. § 30.27(1), which recognizes the Lower St. Croix River as part of the national wild and scenic rivers system, and the legislature also enacted § 30.27(2), which requires the Department of Natural Resources (DNR) to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Wisconsin also enacted Wis. Stat. § 30.27(3), requiring all affected

municipalities to adopt ordinances at least as restrictive as those of the DNR and forcing the DNR and municipalities to adopt riverway zoning that complies with DNR standards.

The DNR adopted Admin. Code Chapter NR 118. The Town of Troy has its own Riverway ordinance serving a similar purpose to that enacted by St. Croix County in 1975 and revised it in 1977 to make it consistent with NR 118. The ordinance provides:

> SUBSTANDARD LOTS Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

The substandard lots provisions are the subject of the Murrs' regulatory taking claim in this action.

No attempts to obtain variances or construction permits were applied for until late 2004 or early 2005. It was around this time that the Murrs began considering subdividing their property, selling the portion contained in Lot E and building a residence outside of the existing cabin's footprint on Lot F. At this time, the Murrs discovered the regulations on the property prevented them from selling Lot E.

Because the substandard lot provisions barred this type of development, the Murrs requested the following variances from the County in 2006: (1) variance to sell or use two contiguous substandard lots (Lots E and F) in common ownership as separate building sites; (2) variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) variance to fill, grade, and place a structure in the slope preservation zone; (4) special exception to fill and grade within forty feet of the slope preservation zone; (5) special exception to fill and grade over 2000 square feet; (6) variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) variance to reconstruct a patio within the ordinary high-water mark setback; and (8) variance to construct a deck within the ordinary high-water mark setback.

The first variance request, to separately sell or use Lots E and F, is the subject of this lawsuit. The above listed variances/exceptions are the only ones ever filed to the Board of Adjustment. No formal application has been made to the Town, County or State since 2006.

The St. Croix County Board of Adjustment ("Board") conducted a public hearing in June 2006 and

denied all of the Murrs' requests in a written decision dated and filed on June 28, 2006. The Murrs sought certiorari review in St. Croix County Case 06 CV 545. After hearing arguments and viewing the property, the Court affirmed the Board's denial of the Murrs' request to sell or use Lots E and Fas separate building sites. However, the Court reversed the Board on the remaining seven requests.

In *Murr v. St. Croix Cnty. Bd Of Adj.*, 2011 WI App 29, 332 Wis.2d 172, 796 N.W.2d 837, the Wisconsin Court of Appeals reinstated the Board's original decision. What is particularly relevant from that decision is that the Court of Appeals affirmed the Board's denial of the request to separately sell or use Lots E and F. The Murrs argued that the substandard lot provisions did not apply to merge Lots E and F because the parcels did not come under common ownership until after the effective date identified in the ordinance. The Court of Appeals disagreed and held that the ordinance applied to all abutting properties that existed on the specified date, regardless of when they came under common ownership.

The Murrs subsequently commenced this action on March 15, 2012, claiming that a regulatory taking occurred by virtue of the application of NR 118 and the local ordinance adopted in conformity thereof. Both the State and County have moved for summary judgment.

LEGAL AUTHORITY

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. §802.08(2). To make a *prima facie* case for summary judgment, the moving party bears the burden of establishing the absence of a genuine issue of material fact. If the moving party satisfies that burden, the court then examines the pleadings, affidavits and depositions to determine whether any material facts are in dispute that would entitle the opposing party to a trial. *See In re Cherokee Park Plat*, 334 N.W.2d 580, 583 (Wis. Ct. App. 1983). The nonmoving party must set forth specific facts showing the existence of a genuine issue for trial. *Maynard v. Port Publ'ns, Inc.*, 297 N.W.2d 500, 561(Wis.1980). Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment. *Bd. of Regents of Univ. of Wis. Sys. V Musallem*, 94 Wis.2d 657, 673-74, 289 N.W.2d 801, 809 (Wis. 1980).

The sole issue before this Court is whether there is a genuine issue of material fact with respect to the whether the application of the substandard lot provisions to the Murrs' property constitutes a regulatory taking.

Timing and Statute of Limitations

Defendants argue the Murrs' lawsuit is time-barred due to the applicable statute of limitations. The Court agrees. It is well known that if a statute of limitations has run, a cause of action no longer exists. *Schafer v. Wegner*, 78 Wis. 2d 127, 254 N.W.2d 193 (1977). A six-year statue of limitations applies to a claim for inverse condemnation. Wis. Stat.§ 893.93(1)(a); *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 21, 300 Wis. 2d 74, 729 N.W.2d 415. A cause of action

accrues on the date the injury is discovered or with reasonable diligence should be discovered. *Hansen v. A.H Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). Reasonable diligence is defined as "such diligence as the majority of persons would use in the same or similar circumstances." *Spitler v. Dean*, 148 Wis. 2d 630, 638 N.W.2d 308 (1989).

Here, the substandard lot provisions have been in place since 1975 and those regulations had immediate economic consequence on the ability to develop the property at that time. With reasonable diligence, the Murrs easily could have discovered the existence of those provisions. At the latest, they should have exercised such diligence in 1995 when the lots came under common ownership of the Murrs. Furthermore, it is undisputed that the Murrs have actual knowledge of the substandard lot provision in 2004 or 2005, when they began discussions with St. Croix County regarding the sale and development of Lot E separately from Lot F. Even if the cause of action did not accrue until April 12, 2005, when the Murr's attorney sent an email regarding the Ordinance, the filing of the suit on March 15, 2012 would still be untimely under the six-year statute of limitations. The cases cited by the Murrs are distinguishable and do not change the fact that the Murrs' claim arose long before the Wisconsin Supreme Court denied their petition for review on May 24, 2011. Whether using 1975, 1995 or 2005 as the starting point, the result is the same: the Murrs' claim is barred by the applicable six year statute of limitations.

Regulatory Taking

Article I, § 13 of the Wisconsin State Constitution provides that "[t]he property of no person shall be

taken for public use without just compensation therefore." The threshold inquiry of this Court is whether the government action constitutes a "taking." *Zealy v. City of Waukesha*, 201Wis.2d365, 378, 548 N.W.2d 528 (Wis. 1996). A government's conduct constitutes a taking if: (1) the government actually and physically occupies private property; or (2) the government imposes a restriction or regulation that deprives an owner of all or substantially all of the beneficial use of his property. *See R. W. Docks & Slips v. State*, 2001WI 73, ¶¶13-15, 244 Wis.2d 497, 628 N.W.2d 781. A "reduction in economic value—even if dramatic—does not constitute a taking when the owner is left with some beneficial use of the land . . ." *Eternalist Found., Inc. v. City of Platteville*, 225 Wis. 2d 759, 773, 593 N.W.2d 84 (Wis. Ct. App. 1999). When determining whether a compensable regulatory taking has occurred, courts must evaluate the property in question as a whole. *Id.*

Here, the government has not "actually or physically" occupied the private property and thus the Murrs' central argument is the government has deprived them of all or substantially all of the beneficial use of their property. Specifically, the Murrs argue that a genuine issue of fact exists regarding the uses available to Lot E. It was created as a residential lot and is situated in the middle of a residential subdivision. The minimum lot size requirement means that Lot E cannot be sold or developed separately because it has less than one acre of net project area. The Murrs argue that there are no other practical, alternative uses for Lot E and that the regulations have deprived them of all economic value of the property; this Court disagrees.

The Murrs have several available options for the use and enjoyment of their property despite the denial of the variance. The Murrs can reconstruct and flood-proof the existing cabin in the same footprint, they can raise the cabin on fill or pylons and they can build a residence on top of the bluff as opposed to the river level. A year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots. The Murrs retain recreational and residential use of the property despite the denial of the variance. Deposition testimony indicates that the Murrs regularly vacationed at the property and use it as a family gathering place. They have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball at the property.

In addition, the market value of the property has not been significantly impacted by the denial of the variance to separately sell or develop the lots. A professional appraisal was conducted in 2012 based on 2006 property values. The appraiser concluded that the property as one lot has a market value of $698,000, while as two lots, the collective value is approximately $771,000, which is less than a ten percent difference.

This Court is persuaded that there is no genuine issue of material fact that would preclude summary judgment in favor of Defendants. This is not a regulatory taking and the claim fails as a matter of law. The motion for summary judgment is granted and this case is dismissed.

DECISION

Based on the foregoing **IT IS HEREBY ORDERED** that Defendants' motion for summary judgment is **GRANTED**. This is a final order for purpose of an appeal.

BY THE COURT:

Dated this 31st day
of October 2013.

S/ SCOTT NEEDHAM
Honorable Scott R. Needham

Circuit Court Judge
Branch III

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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You are hereby notified that the Court has entered the following order:

Appendix C–2

No. 2013AP2828 Murr v. State L.C.#2012CV258

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiffs-appellants-petitioners, Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

ST. CROIX COUNTY CODE OF ORDINANCES, LAND USE & DEVELOPMENT

Subch. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36, I.4.a.

4. SUBSTANDARD LOTS

Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

(a) 1. The lot is in separate ownership from abutting lands, or

2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

RECEIVED
& AND
BRIEFS

No. 15-214

SUPREME COURT, U.S.
FILED
OCT 16 2015
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a regulatory takings action, should a court evaluate a claimant's property as a whole when that property is contiguous, has been held in common ownership for many years, and is unified in use?

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STATEMENT

Respondent, St. Croix County, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioners, Joseph P. Murr, Michael W. Murr, Donna J. Murr and Peggy M. Heaver.

OPINIONS BELOW

The St. Croix County Circuit Court dismissed Petitioners' regulatory takings claim on summary judgment. In doing so, it ruled that the claim was time-barred under the applicable statute of limitation and that there was no regulatory taking as a matter of law. The court did not consider whether Petitioners' claim was ripe for adjudication. The court's decision is unreported and a copy of the opinion is included in Petitioners' Appendix at B-1

The Wisconsin Court of Appeals affirmed the circuit court's ruling on the basis that there was no regulatory taking as a matter of law. The court declined to rule on the statute of limitations issue and did not consider whether Petitioners' claim was ripe for adjudication. The court's decision is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). A copy of the opinion is included in Petitioners' Appendix at A-1.

The Wisconsin Supreme Court issued an Order denying a Petition for Review on April 16, 2015. A

copy of the court's Order is included in Petitioners' Appendix at C-1.

JURISDICTION

The United States Supreme Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides, in part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III. V, Lower St. Croix Riverway Overlay Dist. § 17.36 I.4.a. A copy of the relevant sections of this Ordinance is included in Petitioners' Appendix at D-1.

STATEMENT OF THE CASE AND FACTS

In the mid-1990s, Petitioners acquired from their parents beautiful riverfront property with a cabin located directly on the banks of the scenic St. Croix River. When Petitioners acquired the property, they knew that it was highly protected by federal, state, county and local (i.e., town) regulations intended to preserve the area's beauty and significance.

Ten years after Petitioners acquired the property, they drew-up a grandiose plan to redevelop the cabin as a riverfront residence, despite the fact that they knew the plan was disallowed under certain land-use regulations that have been in place since 1975.

Nevertheless, Petitioners submitted their plan to the St. Croix County Board for consideration. The Board denied their plan and refused to make an exception to the longstanding regulations. Instead of modifying the plan – or submitting a less-intrusive plan that complied with the existing regulations – Petitioners filed this lawsuit alleging a regulatory taking.

A. The Property at Issue.

Petitioners currently own property along the St. Croix River in St. Croix County, Wisconsin. The property is recorded as two separate lots on the St. Croix Cove subdivision plat – Lot E and Lot F.

B. Petitioners Placed Their Property in Common Ownership.

Petitioners' parents originally purchased Lot F in 1960 and transferred it to their plumbing business. Soon thereafter, they built a three-season cabin entirely within the confines of Lot F which is still used by Petitioners and their family to this day. The parents subsequently purchased adjacent Lot E in 1963. Lot E was vacant at the time and has always remained vacant.

The parents voluntarily conveyed title to Lot F and Lot E to Petitioners in 1994 and in 1995, respectively. They did so despite the fact that applicable transfer deeds and contracts clearly specified that the property was "subject to easements, covenants, restrictions and declarations of record."

Those transactions – which were voluntarily effectuated by Petitioners and their parents – placed Lots E and F in common ownership and triggered the land-use regulations discussed below. In other words, had Petitioners and their parents not placed the two lots in common ownership, the regulations at issue would be inapplicable. Contrary to what Petitioners suggest, it was their own acts, not the conduct of the County or State, which caused their property to be subjected to the applicable land-use regulations.

C. The Land-Use Regulations.

Petitioners' property is protected by a host of federal, state, county and local regulations.

Congress enacted the National Wild and Scenic Rivers Act (Act) in 1968 to preserve certain rivers for the enjoyment of present and future generations, to wit:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dams and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.

Wild & Scenic Rivers Act, October 2, 1968.

The Act, which designates certain rivers as "wild, scenic, or recreational," safeguards the character of those rivers, recognizes the potential for their appropriate use, and encourages management and protection.

Designated rivers are protected by landowners and river users, and through governmental regulations and programs. Designation encourages recreation, agriculture and residential development. It does not prohibit development or give the government control over private property.

Congress designated a portion of the St. Croix River as a National Scenic Riverway as "wild, scenic, or recreational" under the Act. In response, the Wisconsin Legislature enacted Wisconsin Statute § 30.27(1), which recognizes the Lower St. Croix River as part of the national wild and scenic rivers system, and § 30.27(2), which requires the Department of Natural Resources (DNR) to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River."

In 1973, Wisconsin enacted § 30.27(3) which requires all affected municipalities to adopt ordinances at least as restrictive as those of the DNR and which forces the DNR and municipalities to adopt riverway zoning that complies with DNR standards. The DNR responded by adopting Administrative Code Chapter NR 118. Likewise, in 1975, St. Croix County enacted the Lower St. Croix Riverway Ordinance and revised it in 1977 to make it consistent with NR 118.

The Lower St. Croix Riverway Ordinance mirrors Wis. Admin. Code § NR 118.08(4) and provides as follows:

> **SUBSTANDARD LOTS**: Lots of record in the Register of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> The lot is in separate ownership from abutting lands, or [t]he lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.*
>
> All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

St. Croix County, WI, Code of Ordinances, Land Use & Development, Sub. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36I.4.a. (July 1, 2007) (emphasis added); Wis. Admin. Code § NR 118.08(4).

This substandard lots provision is the subject of Petitioners' regulatory takings claim.

D. Petitioners' Development Plan and Variance Requests.

Petitioners' parents never attempted to develop the property before they conveyed it to their children. In fact, neither Petitioners nor their parents approached the State, County or Town in regard to developing the property until late 2004 or early 2005, when Petitioners sought to flood-proof the existing cabin after numerous flooding events. Around that time, Petitioners also began to consider selling the portion of the property recorded as Lot E and building a new residence outside of the existing cabin's footprint.

In August of 2005, Petitioners received a letter from St. Croix County's zoning department in response to their questions regarding the potential reconstruction and expansion of their cabin. The letter indicated that Petitioners were required to obtain special exception permits or variances in order to proceed with their desired plan.

Indeed, Petitioners have always needed variances to proceed with their desired plan because the substandard lots provision discussed above has always barred the same. Both lots have less than one acre of building space and are considered to be in the floodplain. Petitioners' plans involved, among other things, reconstructing the residence on a new footprint and raising the elevation of the cabin to remove it from the floodplain. As the lots exist today, they have a combined total of less than one acre of net

project area, the majority of which is above the bluff-line. Separate, each lot is approximately one acre in size with only one-half acre of net project area.

Because the substandard lots provision precludes this type of development, Petitioners requested the following variances from the County in 2006: (1) a variance to sell or use two contiguous substandard lots (Lots E and F) in common ownership as separate building sites; (2) a variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) a variance to fill, grade, and place a structure in the slope preservation zone; (4) a special exception to fill and grade within forty feet of the slope preservation zone; (5) a special exception to fill and grade over 2000 square feet; (6) a variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) a variance to reconstruct a patio within the ordinary high-water mark setback; and (8) a variance to construct a deck within the ordinary high-water mark setback. *See Murr v. St. Croix Cnty. Bd. of Adj.*, 2011 WI App. 29, ¶5, 796 N.W.2d 837.

The first variance request – to separately sell or use Lots E and F – is the subject of this lawsuit. The eight requests for variances and/or exceptions are the only requests that Petitioners have ever made. Petitioners have never submitted any other application to the County, Town, or State.

St. Croix County zoning staff and the DNR did not recommend approval of the plans. The zoning

staff did not recommend approval because numerous other options were available such that Petitioners did not meet the "hardship" exception necessary to obtain variance approvals.

One option was that a compliant building site existed on top of the bluff. The other option was that the existing cabin could be properly flood-proofed in the same location. Doing so would not require any filling, grading or tree removal and would protect the structure during any future flooding. The zoning staff did not believe that a hardship existed because Petitioners had a compliant building site on their property and could flood-proof their existing cabin. Additionally, because the existing cabin qualifies as a nonconforming structure, Petitioners could flood-proof the cabin and expand it up to 50% of its assessed value without obtaining a variance. Finally, the zoning staff also discovered that the instances of flooding were self-created because Petitioners built in a floodplain.

Similarly, the DNR believed that the hardship exception could not be met because a buildable area on top of the bluff existed on which Petitioners could build a new residence without obtaining variances or special exceptions. Although variances are the mechanism for landowners who have no other options, the DNR concluded that Petitioners *did, in fact*, have choices which negated their need for variances. The DNR also expressed several concerns with lot reconfiguration, demolition of the existing structure, floodplain fill and construction of new residential

structures. In addition, it noted that improvements of up to 50% of the current fair market value of the existing residence are allowed in floodplain zoning. Finally, riverway zoning also allows for improvements to existing structures. Petitioners chose not to pursue any of these available options.

E. Appeal of the Variance Denials.

The St. Croix County Board of Adjustment (hereinafter, "Board") conducted a hearing in June of 2006 and denied all of Petitioners' variance requests. Its decision triggered subsequent appeals and this lawsuit.

The St. Croix County Circuit Court affirmed the Board's denial of the variance to separately sell or use Lot E on certiorari review. Petitioners appealed that decision to the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals affirmed the Board's denial of the variance in a published opinion, *Murr v. St. Croix Cnty. Bd. of Adj.*, 2011 WI App. 29, 332 Wis. 2d 172, 796 N.W.2d 837. In doing so, it recognized that the Lower St. Croix Riverway Ordinance "applied to all abutting properties that existed on the specified date, regardless of when they came under common ownership" and explained that

> When the provisions became effective, every person who already owned a lot could still build. If the lot was too small under the new rule, that was acceptable; owners could still build on their lot or sell it as a developable

> lot. However, if the substandard lot owner owned an adjacent lot as well, then the lots were effectively merged and the owner could only sell or build on the single larger lot. This result preserved both property values and the environment.

Id., ¶ 14.

The Wisconsin Court of Appeals also held that the application of the substandard lots provision did not deprive Petitioners of any property rights. *Id.*, ¶ 16. It explained that because "the provisions [were] already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized." *Id.*

Finally, the court noted that:

> [B]ecause Murr is charged with knowledge of the existing zoning laws, as a subsequent owner she was already in a better position than any person who owned at the provisions' effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, the parcel would forever remain a distinct saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

Id., ¶¶ 17-18 (internal citations omitted).

F. Development Options and Use of Petitioners' Property.

Petitioners can develop and use their property despite the denial of the variance. In fact, Petitioners have always retained the following development options which they refuse to pursue:

First, Petitioners could build a sizable, year-round residence on the level area located at the top of bluff. Their current cabin is not winterized and has only been used as a three-season cabin. In addition, it can only be accessed via Cove Court, a private road located on a 30' easement owned by the Winford Land Owners Association. Because of its steep grade, Cove Court is posted: "Steep hill no winter traffic." Hence, in the winter, Petitioners' current cabin is accessible only by foot, snowmobile or ATV.

In contrast, the level area on top of the bluff has frontage on Cove Road, a paved town road. Petitioners could construct a year-round residence on that area – like the hundreds of other families who own property along the St Croix River. *The residence could be built entirely on Lot E, entirely on Lot F, or it could straddle both lots.* Petitioners have chosen not to pursue this option because of their "desire to be on the water."

Second, Petitioners could reconstruct and flood-proof the existing cabin in the same footprint. They have chosen not to pursue this option because "it would require [them] to walk up a full flight of stairs to enter the main living area" of their cabin.

Third, Petitioners could raise the existing cabin on fill or pylons. They have chosen not to pursue this option because they are concerned with the cabin's "curb appeal" or "beach appeal," in that they would own the only cabin "that looks like that on the river, so it would actually, we felt, would make it look undesirable." The cabin "would look, in [their] opinion, like something you'd see on the Carolina coast versus the St. Croix River. We felt that we could do a better job of making it look good from the river by moving it back and putting it on fill."

Petitioners also retain recreational and residential uses of their property despite the denial of the variance. Petitioners have indicated that they regularly vacation at the property during the summer months, and that they consider the property "a family gathering place" that "keep[s] the family together" and provides private enjoyment for "19 nieces and nephews that can come and go freely." It is a place where Petitioners "spend quality family time," and go swimming without "worry[ing] about boat traffic and unsafe conditions."

The denial of the variance does not prevent Petitioners from using or enjoying their property. They can continue to play volleyball, park their vehicles, safely swim and engage in other recreational activities on the property. Moreover, they can continue to enjoy the heightened level of privacy associated with their ownership of the property.

G. Market Value of Petitioners' Property.

The market value of Petitioners' property has not been significantly impacted by the denial of the variance. Scott Williams, a licensed property appraiser, inspected and appraised the property on November 20, 2012. His appraisal was based on the property as it existed in June 2006.

Scott Williams first appraised Petitioners' property as a single 2.5-acre parcel, and then as two separate 1.25-acre parcels. As one parcel, the property has a market value of $698,000. As two parcels, it is valued at approximately $771,000. The difference in value between Petitioners' property as one lot, as opposed to two, is $72,800 – less than ten percent.

REASONS FOR DENYING THE WRIT (ARGUMENT)

I. CONSIDERATIONS GOVERNING CERTI

in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) *a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals*; or

(c) *a state court* or a United States court of appeals *has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

Sup. Ct. R. 10 (emphasis added).

II. THE PETITION SHOULD BE DENIED

It is well-settled that a claimant alleging a regulatory taking of his or her property is required to demonstrate a significant loss in value with respect to the "parcel as a whole." *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). The Supreme Court first articulated the "parcel as a whole" rule in *Penn Cent. Transp. Co.*, where it explained that:

> Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether the rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effectuated a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

Id.

The Supreme Court confirmed this rule in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 498 (1987), where coal operators asserted that a court should only consider the coal that

Six years later, the Supreme Court again endorsed the "parcel as a whole" rule in *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). There, Concrete Pipe claimed that a regulatory taking occurred when federal law required it to pay "withdrawal liability" to a pension trust. *Id.* at 605. Concrete Pipe argued that a court should only consider the required payment to determine whether a compensable taking occurred. *Id.* at 643. The Supreme Court rejected that argument and reiterated the need to evaluate the economic impact on the entire property, not just the regulated portion:

> [A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Id. at 644 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 130-31).

Subsequently, in 1997, Justice Scalia authored a concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 749 (1997) in which he expressed support for the "parcel as a whole" rule

subject to the regulation (or at least the contiguous parcels); and the use of the land, as a whole, had not been diminished." *Id.*

Finally, in 2002, the Supreme Court solidified its acceptance of the "parcel as a whole" rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). There, it held that a regional planning agency's temporary moratorium on development did not impose a categorical taking because the properties in question retained potential future use. *Id.* at 332. The Supreme Court based its holding on the "parcel as a whole" rule and explained that "[b]oth dimensions of a real property interest – the metes and bounds describing its geographical dimensions and the terms of years describing its temporal aspect – must be considered in viewing the interest in its entirety." *Id.* at 303. It explained that:

> Neither *Lucas*, nor *First English*, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the 'extraordinary case' . . . *the default rule remains that, in the regulatory takings context, we require a more fact specific inquiry.*

Id. at 332 (emphasis added).

Here, Petitioners claim that review is warranted because the Supreme Court has not provided a categorical rule to define the relevant property, or to

determine what the "parcel as a whole" consists of, in a case precisely like the one at hand which "involves land, traditional parcels, and common residential lots." (Petition, p. 15.) While this may be true, the Supreme Court has also unmistakably explained that good reason exists for refusing to establish such specific and bright-line rules in regulatory takings cases.

Concepts of fairness and justice – which form the basis of the takings clause – are best served by eschewing any set formulas for determining when compensation is due. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 ("we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"). The Supreme Court has repeatedly emphasized that regulatory takings law is "characterized by an essentially ad hoc, factual inquiry . . . designed to allow careful examination and weighing of all the relevant circumstances." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). It has instructed courts to weigh all relevant circumstances in context to determine whether a compensable regulatory taking has occurred. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially, ad hoc, factual inquiries'"); *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 342

("we still resist the temptation to adopt *per se* rules . . . preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula").

The Supreme Court has explained that, in the regulatory takings context, an ad hoc approach is proper for determining whether compensation is due. This includes the determination of the relevant property, or the determination of precisely what the "parcel as a whole" consists of. Review is therefore not warranted on this basis.

III. THE PETITION SHOULD BE DENIED BECAUSE A SUBSTANTIAL CONFLICT DOES NOT EXIST AMONG THE LOWER COURTS.

Petitioners claim that "state and federal courts are in substantial conflict" with respect to the issue at hand and cite numerous cases in an attempt to derive support for their proposition. Those cases – as well as the examples provided below – all involve different facts and circumstances. They confirm that a flexible, ad hoc, approach has consistently been used by the lower courts to define the relevant property and to determine whether compensation is due.

Perhaps the most influential factors that lower courts consider are whether the property is contiguous and held in common ownership. *See, e.g.*, *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 377, 548 N.W.2d 528 (1996) (analyzing the property as a whole, as *Penn Central*, *Keystone*, and other persuasive authorities

"do not support the proposition that a contiguous property should be divided into discrete segments for purposes of evaluating a takings claim."); *Giovanella v. Conservation Com'n of Ashland*, 447 Mass. 720, 729, 857 N.E.2d 451 (2006) ("[T]he extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property."); *Daniels v. Area Plan Commission of Allen Cnty.*, 306 F.3d 445 (7th Cir. 2002) (common ownership of lots afforded beneficial presumption of a contiguous whole); *East Cape May Ass. v. New Jersey*, 693 A.2d 114, 125 (N.J. Super. Ct. App. Div. 1997) ("The majority of out-of-state cases which have considered the composition of the denominator of the taking fraction have held that it consists of all of the claimant's contiguous acreage in the same ownership.").

Lower courts also consider a claimant's actual use and treatment of the property. *See, e.g.*, *Forest Prop., Inc. v. U.S.*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (evaluating the property as a whole despite the fact that the property was recorded as separate lots because "the economic reality of the arrangements . . . transcended these legalistic bright lines."); *Giovanella*, 447 Mass. at 730 ("we consider an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause."); *Norman v. U.S.*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (including

property because "appellants themselves regarded the 2,280 acre parcel as a single economic unit"); *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (severing conservation land from land intended for residential development); *Appolo Fuels, Inc. v. U.S.*, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (combining contiguous leases even though purchased at different times because they were part of "one unified mining plan"); *K & K Constr., Inc. v. Dept. of Natural Res.*, 456 Mich. 570, 582, 575 N.W.2d 531 (1998) (combining lots, in part, because owners "forged a connection between parcels . . . through the proposed development scheme and permit applications").

A claimant's prior knowledge of existing regulations has also been considered. *See, e.g., U.S. v. Ciampitti*, 22 Fed. Cl. 310 (1991) (the court dismissed the regulatory takings claim and, in its relevant parcel analysis, was influenced by the actual and constructive notice of the applicable regulations prior to the purchase); *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002) (considering the fact that claimant failed to conduct proper due diligence prior to purchasing property which would have revealed existing regulations).

Finally, a flexible, ad hoc, approach has allowed lower courts to consider countless other factors, such as: (1) whether an artificial or natural structure divides the property, *see Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000) (describing property on either side of a road as physically remote); *Coeur D'Alene v. Simpson*, 142 Idaho 839, 136

P.3d 310 (2006) (presence of a road not determinative, but "one factor to consider"); (2) when the property was acquired, *see FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, Inc.*, 41 Mass. App. Ct. 681, 673 N.E.2d 61 (1996) (treating as one unit all lots purchased within same subdivision on same date); *Ciampitti*, 22 Fed. Cl. at 318-19 (finding noncontiguous lots acquired on same date to be one parcel); (3) whether the purchase or financing of the lots were linked, *see Forest Prop., Inc.*, 177 F.3d 1360 (treating two lots as one unit, in part, because option to purchase lake-bottom land could be exercised only by owner of adjacent property); *Ciampitti*, 583 F. Supp. at 319 (treating two noncontiguous lots as one parcel, in part, because the lots were "inextricably linked in terms of purchase and financing"); and (4) how the property is regarded under state law, *see Lucas*, 505 U.S. at 1016 n.7 (proposing solution to denominator problem according to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land").

The cases cited in the Petition – as well as the examples provided above – reveal that a flexible, ad hoc, approach has consistently been used to define the relevant property and to determine whether compensation is due. State and federal courts are not in "substantial conflict" with respect to the same. Consequently, review is also not warranted on this basis.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE WISCONSIN COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH DECISIONS FROM OTHER COURTS.

The Wisconsin Court of Appeals also utilized a flexible approach and considered the specific circumstances surrounding Petitioners' claim to define the relevant property and to determine whether compensation is due. Its decision is therefore not in conflict with those from other state courts or federal courts.

As in many other cases, the Court of Appeals considered the fact that Petitioners' property was contiguous and commonly owned, and found those factors to be extremely influential. It noted that "[t]here is no dispute that the Murrs own contiguous property" and then explained that "[r]egardless of how that property is subdivided, contiguousness is the key fact. . . ." (Ct. App. Dec., ¶ 19.) As in many other cases, the Court of Appeals acknowledged the fact that Petitioners were aware of the applicable regulations when they took common ownership of Lots E and F. It explained that Petitioners "knew or should have known that their lots 'were heavily regulated from the get-go'" and reiterated that "this is precisely why we concluded in the Murrs' earlier appeal that any diminution in their property's value occurred at the time they took title to both contiguous lots." (Ct. App. Dec., ¶ 29.) Finally, as in many other cases, the Court of Appeals evaluated how Petitioners actually used and treated the property. It noted that

Petitioners "presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance," and conclude that "even if the[y] intended to separately develop or sell Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." (Ct. App. Dec., ¶ 30.)

Petitioners correctly note that "as originally created, each parcel [Lots E and F] was a separate and distinct legal lot." (Petition, p. 3.) However, this fact is certainly not outcome dispositive and is insufficient to justify review. Indeed, the Supreme Court has explained that takings jurisprudence precludes reliance on "legalistic distinctions within a bundle of property rights." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 500. Lower courts have routinely recognized the same. *See, e.g.*, *Broadwater Farms Joint Venture v. U.S.*, 35 Fed. Cl. 232, 239-40 (1996) (holding that the relevant parcel includes all of claimant's contiguous property even though it was subdivided prior to the purchase); *K & K Constr., Inc.*, 456 Mich. at 580 (contiguous lots under the same ownership are to be considered as a whole . . . despite the owner's division of the property into separate, identifiable lots."); *District Intown Properties Lt. Part. v. Dist. of Columbia*, 198 F.3d 874, 883 (D.C. Cir. 1999) (relevant parcel included the entire property because it was contiguous and held in common ownership, and because the claimants treated it as an integrated

whole. Legal distinctions and tax treatment of the lots were not dispositive factors.).

Because the Court of Appeals considered the specific circumstances surrounding Petitioners' claim to define the relevant property and to determine whether compensation is due, its decision is in-line with those from other courts. Consequently, review is also not warranted on this basis.

V. THE PETITION SHOULD BE DENIED BECAUSE THE FACTS AND CIRCUMSTANCES PRESENTED IN THIS CASE MAKE IT A POOR VEHICLE FOR REVIEW, INCLUDING BECAUSE THE CLAIM IS UNRIPE, BARRED BY THE STATUTE OF LIMITATIONS, AND DOES NOT PRESENT A VIABLE REGULATORY TAKINGS AS A MATTER OF LAW.

Contrary to Petitioners' argument, this case does not present a straightforward or recurrent factual pattern. It involves case-specific facts that must be carefully evaluated and weighed in order to determine whether a regulatory taking occurred. Any ruling with respect to the "parcel as a whole" issue would be case-specific and inapplicable to other regulatory takings cases that present their own set of unique facts and circumstances. Indeed, the Supreme Court has already indicated that categorical rules are inappropriate in cases such as the one at hand. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 ("Indeed, we have frequently observed that whether a particular

restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"); *Lucas*, 505 U.S. at 1015 ("we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially, ad hoc, factual inquiries'"); *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 342 ("[W]e still resist the temptation to adopt *per se* rules . . . preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula").

In addition, any ruling with respect to the "parcel as a whole" issue would not impact the ultimate disposition of this case. Petitioners' regulatory takings claim will nevertheless be dismissed for the following reasons.

First, Petitioners cannot demonstrate that Lot E – even on its own – has been rendered practically useless or valueless. Petitioners confuse the ability to develop Lot E as a second, *separate lot* with the ability to develop or use Lot E *at all*. Petitioners are correct that they cannot separately develop Lot E as a standalone property in light of the Lower St. Croix Riverway Ordinance; however, it does not follow that they cannot develop or use any part of Lot E at all.

The question in this case is whether Petitioners can develop or use Lot E at all. The record reveals that Lot E can be used in all of the same ways as Lot F. It is undisputed that Petitioners can build a new

residence on top of the bluff that is *entirely located on Lot E*, entirely located on Lot F, or that straddles both lots. While Petitioners may have chosen not to pursue any other development options because they prefer to keep their cabin by the river, those options are nevertheless available.

Nor can Petitioners establish that Lot E has been rendered valueless. Respondent's expert, Scott Williams, appraised the entire property as a whole as of June 28, 2006, the date of the alleged taking. He determined that "as one lot [it] has a market value of $698,000, while as two lots, the collective value is approximately $771,000, which is less than a ten percent difference." As a matter of law, a ten percent loss in property value does not constitute a compensable regulatory taking. Unlike Scott Williams, Petitioners' appraiser, Timothy Williamson, did not appraise the 2006 value of the property as a whole.[1] Instead, he limited his appraisal to include only Lot E. In addition, to the extent that assessed values are relevant, tax assessor Roger Koski also failed to appraise or assess the property as a whole as of 2006. Their opinions were therefore improper.

Second, the regulatory takings claim is time-barred under the applicable statute of limitations.

---

[1] June 28, 2006 is the date that the Board of Adjustment issued its decision denying the request for the variance. Both parties' appraisers used this date as the date of evaluation for their appraisals; however, only Williams appraised the land in both Lots E and F.

Although the Court of Appeals declined to rule on this issue, the circuit court property held that Petitioners' claim was precluded by the six-year statute of limitations which accrued when the injury was discovered, or with reasonable diligence should have been discovered.

In Wisconsin, a six-year statute of limitations applies to a claim for inverse condemnation. Wis. Stat. § 893.93(1)(a); *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 21, 300 Wis. 2d 74, 729 N.W.2d 415. The cause of action accrues on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. *Hansen v. A.H. Robins, Inc.* 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). Wisconsin courts have explained that reasonable diligence "means such diligence as the majority of persons would use in the same or similar circumstances." *Spitler v. Dean*, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989).

The statute of limitations in this case accrued in 1975, when the Lower St. Croix Riverway Ordinance was passed and had an economic impact on Petitioners' property. In the alternative, it accrued when Petitioners acquired the property in 1995. At that time, they knew (or should have known through due diligence) that the Lower St. Croix Riverway Ordinance applied to their property and impacted their ability to separately sell and develop Lot E. At the very latest, Petitioners obtained actual knowledge on April 12, 2005, when their attorney sent them an email advising them to seek guidance from the County

Attorney "as to the applicability of the county's ordinance relative to the Murr property."

Because Petitioners filed the lawsuit on March 15, 2012, their regulatory takings claim was time-barred by the six-year statute of limitations regardless of whether it accrued in 1975, 1995 or 2005.

Third, the regulatory takings claim is unripe for adjudication because Petitioners did not exhaust available state and administrative remedies before filing this lawsuit. Other than the grandiose plan seeking an excessive amount of variances, Petitioners have never submitted any meaningful or less-intrusive development proposals with respect to their property as a whole. Nor have they exhausted available remedies with respect to Lot E. The Supreme Court should not accept the Petition on an academic issue involving the "parcel as a whole" rule when Petitioners have not even ripened their claim.

A court cannot adjudicate a land-use decision unless the property owner has exhausted all available state and administrative remedies. *Williamson Cnty. Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985). The Supreme Court explained the exhaustion requirement in dismissing a land-use claim in *MacDonald v. Yolo Cnty.*, 477 U.S. 340 (1986). There, the Court explained that a claim cannot be adjudicated if "less-intrusive" proposals or plans regarding the sought-after development have not been submitted or pursued. *Id.* It noted that "[a] court

cannot determine whether a regulation has gone too far unless it knows how far a regulation goes." *Id.*

Like in *MacDonald*, Petitioners have never submitted any less-intrusive plans or proposals regarding development on the property as a whole. On the contrary, they only submitted their ideal proposal for review, which involved a grandiose plan to build on the river that required numerous variances. Petitioners have never submitted an application to build a residence on top of the bluff. Nor have they applied to raise the existing cabin because they are concerned with the "curb appeal" and "beach appeal." Finally, Petitioners have never requested any variances to flood-proof on fill in the existing cabin's footprint. Because Petitioners have options available, they cannot maintain their regulatory takings claim until they pursue one or more of those options. Or, at a minimum, submit a less intrusive proposal (as compared to their grandiose development plan).

CONCLUSION

For all of these reasons, the Supreme Court should deny the Petition for Writ of Certiorari.

Dated this 16th of October, 2015.

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In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Wisconsin, Division III

REPLY TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTRODUCTION

St. Croix County opposes the Murrs' Petition on three grounds, none of which have merit. First, the County claims that the Question Presented has already been answered by this Court. That view is far from accurate, and contrary to this Court's own recognition in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court"), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("we have at times expressed discomfort with the logic of this rule"). In *Palazzolo*, this Court expressly recognized the "persistent question of what is the proper denominator in the takings fraction." *Id.* The Court further explained:

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Id. Of course, unlike in *Lucas* and *Palazzolo*, the Question Presented by the Murrs places the "parcel as a whole" issue squarely before the Court.

Second, the County asserts that there is "good reason" for refusing to establish specific and bright line rules in regulatory takings cases. Ironically, it is the Wisconsin court below that establishes a "**rule** that

contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20 (emphasis added). If anything, the County's assertion provides additional reason for this Court to answer the Question Presented.

Moreover, the County misses the point. The question is whether the *Penn Central* "parcel as a whole" concept directs the lower court to rule as a matter of law that two legally distinct parcels, purchased at separate times and for separate purposes, are required to be combined for Takings Clause analysis simply because the parcels are contiguous and commonly owned. This case was decided on summary judgment. There is no factual dispute. The Wisconsin court said that "contiguousness is the key fact" and proclaimed a "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." Petition at 9 (citing App. at A-10 ¶ 19 and A-11 ¶ 20). The Question Presented provides the Court the opportunity to give much needed guidance regarding the application of the "parcel as a whole" concept to typical residential parcels. For procedural reasons, the Court could not reach that issue in *Lucas* and *Palazzolo*, but now the opportunity to address the issue is properly before the Court, and should now be addressed.

Third, the County contends that the conflict of decisions among the lower courts is due to the divergent facts and circumstances presented by those cases. But the County's discussion actually highlights the conflicting approaches and underscores the need for this Court's guidance.

Although not a reason to deny the Petition, the County also suggests that the Murrs will never win their taking claim on the merits. Regardless of the County's self-serving prediction, the reality is that if the writ of certiorari is granted, and the Wisconsin court is reversed on the "parcel as a whole" analysis, nobody knows what the outcome would be in a trial on remand from this Court. The County's speculation presents no reason to decline this opportunity to finally address the parcel as a whole concept as applied to typical residential parcels.

A final stab by the County suggests that this case is either beyond the statute of limitations, or it is not yet ripe for judicial review. While those problems persist in many takings cases, neither is a problem here. Indeed, because of the clean procedural posture, the Murrs' case is ready for this Court's review.

CORRECTION TO THE COUNTY'S MISSTATEMENT OF FACT

Although the County engages in various factual "spin" efforts, there is one glaring misstatement of fact that needs to be addressed. In its opposition, the County provides its version of the Question Presented, wherein the County characterizes Lot E and Lot F as being "unified in use." This characterization is wrong.

As stated above, this case was decided against the Murrs on summary judgment. The court below acknowledged the undisputed facts as including the following:

> In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which has **remained vacant** ever since. The Murrs allege Lot E was purchased as an investment property,

> with the **intention of developing it separately** from Lot F or selling it to a third party.

App. A-3 ¶ 4 (emphasis added). These are the undisputed facts, which the court below correctly acknowledged must be viewed in the light most favorable to the Murrs. App. A-2 ¶ 3. Indeed, even the County admitted:

> Petitioners' parents originally purchased Lot F in 1960 . . . Soon thereafter, they built a three-season cabin **entirely within the confines of Lot F** which is still used by the Petitioners and their family to this day. The parents subsequently purchased Lot E in 1963. **Lot E was vacant** at the time and **has always remained vacant.**

Brief in Opposition to Petition for Writ of Certiorari at 4 (emphasis added). In short, there is no basis for the County's assertion that there is a unity of use between Lot F and Lot E.

This case provides the needed opportunity to address how to define the horizontal boundaries of land for determining whether there is a regulatory taking. That question has been described by commentators as "the most significant unresolved question" in Takings Clause jurisprudence. John E. Fee, *Of Parcels and Property, in* Taking Sides on Takings Issues: Public and Private Perspectives 101, 102 (Thomas E. Roberts, ed. 2002). *See also* Petition at 21. Because this case was dispensed with on summary judgment, the relevant facts are necessarily undisputed and do not include the County's unsupported assertion that Lot E and Lot F were "unified in use."

ARGUMENT

I

THE "PARCEL AS A WHOLE" CONCEPT PRESENTS A CRITICAL ISSUE OF FEDERAL TAKINGS LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The County argues that *Penn Central* has already adopted the "parcel as a whole" concept and that it has been followed in subsequent decisions by this Court. In support, the County cites *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 498 (1987) (pillars of coal required to be left in place was not a taking); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (withdrawal liability on a pension trust held not a taking); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (no taking resulting from a moratorium that impacted only a "temporal slice" of the fee interest).

The cited cases where this Court has touched on the "parcel as a whole" concept are all in the context of unique property interests and unusual fact patterns where there is an attempt to divide the fee interest into smaller segments (such as a temporal slice), and thereby assert a taking of that smaller segment. Along the same lines, the County could have cited *Penn Central* (alleging a taking of air space) and *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (ban on selling eagle

feathers; destruction of "one strand of the bundle" is not a taking). Most significantly, these cases provide no guidance on how to apply the parcel as a whole concept when the entire fee interest of a discrete and separate parcel is alleged to be taken. Here, the parcel as a whole concept is applied to the Murrs *not to prevent the segmentation of a fee interest, but to aggregate distinct fee interests.* Of course, by aggregating the separate parcels into a "whole" the effect is to utilize the economic use of Lot F (the existing cabin) as a basis for rejecting the taking claim of Lot E. It is this issue, applying the parcel as a whole concept to aggregate typical horizontal divisions of land that exist as separate fee lots but with contiguous and common ownership, that should be addressed by this Court.

> The Supreme Court has thus failed to provide clear guidance to courts on the denominator question—especially in the horizontal cases. Not only has the Court never decided a case involving horizontal division of land, but it has failed to define the "parcel as a whole." Until this issue is resolved, lower courts will continue to face the crucial question: economically viable use of *what* land?

Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994). It is urged that the Court now provide that needed guidance.

II

STATE AND FEDERAL COURTS ARE IN SUBSTANTIAL CONFLICT

The County asserts that there is no conflict among the lower courts because they "all involve different facts and circumstances." Brief in Opposition at 21. Of course, different cases certainly involve different facts. But this obvious point does not answer the conflict in the law. The County has no response to the divergent approaches in the law. On one hand, the Wisconsin court below states a "well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20 (emphasis added). In contrast, the Florida courts establish the opposite presumption. *Department of Transportation, Division of Administration v. Jirek*, 498 So. 2d 1253, 1257 (Fla. 1986) ("presumption of separateness as to vacant platted urban lots").

There is no need to repeat the variety of cases cited in the Petition showing the conflict among the lower state and federal courts. *See* Petition at 17-21. Indeed, the County's attempt at reconciliation by arguing that the cases involve different facts and circumstances is an implicit acknowledgment of the lack of any coherent or unifying principle regarding contiguous properties in common ownership. It is precisely for this reason that the petition should be granted; so that the lower courts will approach the specific facts of the cases with a consistent understanding of when, if at all, the "parcel as whole" concept should cause the aggregation of distinct parcels of platted lots.

III

THERE ARE NO PROCEDURAL BARRIERS TO GRANTING THE PETITION

The County asserts several theories that are intended to divert the Court's attention from the "parcel as a whole" concept as applied to horizontal divisions of property. But these issues are easily disposed.

First, the County contends that the Petition should not be granted because the Murrs will ultimately lose their takings claim on the merits. Obviously, predictions about how the case would proceed at trial after a remand from this Court should have no bearing on whether the Petition is granted.

Nevertheless, a couple points concerning the merits of the claim are worth rebutting. First, sprinkled throughout its Opposition, the County asserts that the Murrs should have known about the extensive regulations, and that transferring title from the parents to the siblings after the regulations went into effect would diminish their property value. The County apparently believes this assertion has a bearing on the merits of the takings claim. But this Court rejected the "notice" rule in *Palazzolo*.

> [U]nder the proposed [notice] rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all.

Palazzolo, 533 U.S. at 627. This language speaks directly to the Murr siblings—the heirs of their parents. The Court continued:

> A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt of an instrument to accord with the duty to compensate for what is taken.

Id. at 628. In short, the County's assertions about notice, and that the Murr siblings should have known about the impact of the regulations, should have no bearing on the merits of their takings claim on a potential remand from this Court.

Second, the County spends considerable time discussing the efforts by the Murrs to redevelop and improve the cabin on Lot F. All of that discussion is irrelevant. The Murrs do not claim a taking of Lot F. They only claim a taking of Lot E, the investment parcel that has remained vacant since the day it was purchased.

Third, the County refers to the appraisal of its expert, Scott Williams. The County is attempting to show that there is not a substantial economic impact from the denial of the Murrs' right to separately develop or sell Lot E. Of course, loss of value goes to the merits of the takings claim which will only be relevant if the Court grants the Petition and reverses the lower court, thus resulting in a remand for trial. Unmentioned is the Murrs' expert who demonstrated a 90 percent lost value in Lot E. This factual dispute between competing appraisers, while relevant on remand, has no bearing on the posture of the case as it is now before the Court.

The County makes two final arguments. The County asserts that the statute of limitations on the

Murrs' taking claim has expired, and the takings claim is not yet ripe for judicial review.

With respect to the statute of limitations, the court below did not address the issue but assumed that the Murrs' claim was timely filed. App. A-7 ¶ 12. This was for good reason. In Wisconsin, a takings claim must be commenced within six years of accruing. Wis. Stat. § 893.52. The County suggests that the takings claim accrued in 1975 when the regulations at issue were adopted, or when the Murrs should have learned of the regulations. The County is wrong.

It is well established that a takings claim accrues "when all the events necessary to fix the alleged liability of the government have occurred and the claimant is legally entitled to bring suit." *Cristina Inv. v. United States*, 40 Fed. Cl. 571, 576 (Fed. Cl. 1998) (quoting *State of Alaska v. United States*, 32 Fed. Cl. 689, 698 (Fed. Cl. 1995)). Of course, the Murrs were not legally entitled to bring suit until they had a ripe claim. *Royal Manor Ltd. v. United States*, 69 Fed. Cl. 58, 61 (2005) ("a regulatory takings claim will not accrue until the claim is ripe"). This required securing a "final decision" of how the regulations will be applied to the property. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Until there is a final decision regarding how the regulations will be applied, there is not a taking. *United States v. Riverside Bayview Home, Inc.*, 474 U.S. 121, 127 (1985).

Here, the Murrs contended that they were entitled to a grandfather exception that would allow them to develop Lot E separately or, in the alternative, they sought a variance to allow them to develop or sell Lot E. Both of those efforts were unsuccessful. The

grandfather exception was ruled to not apply to the Murrs, and their variance request was denied. *See* Petition at 6 (citing App. at A-2 ¶ 2).

Therefore, at the earliest, their claim ripened on June 28, 2006, when the County board of adjustment denied their variance request to sell or develop Lot E separate from Lot F. At the latest, their claim ripened on May 24, 2011, when judicial review of the grandfather exception and variance denial concluded. The takings claim was filed on March 15, 2012, within six years of either of these events. Accordingly, there is no statute of limitations issue.

Nor is there a ripeness issue. The Murrs allege a taking of Lot E, and only Lot E. They submitted a variance from the regulations to allow development of Lot E. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986) (failure to seek variance may preclude knowing the nature and extent of permitted development). Here, the denial of the applicability of the grandfather exception, and the final decision denying a variance from the regulations, satisfy the ripeness requirements. It is undisputed that the Murrs received a final decision precluding them from separately developing or selling Lot E. Their takings claim is ripe for review.

In short, the County has provided no persuasive reason to deny the Petition.

CONCLUSION

The *Penn Central* "parcel as a whole" concept has never been applied by this Court to a horizontal division of a fee interest in land. Yet, guidance in this

factual context will be most useful to lower federal and state courts, as well as property owners and government regulators who need to know the contours of the Takings Clause. For all the reasons expressed, it is urged that the Petition be granted.

DATED: October, 2015.

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RECORD AND BRIEFS

No. 15-214

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IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

BRIEF OF *AMICI CURIAE* CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, the California Cattlemen's Association, the National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders submit this brief in support of petitioners Joseph P. Murr, et al. ("Petitioners") and respectfully request that the Petition for Certiorari ("Petition") be granted.

The California Cattlemen's Association ("CCA") is the preeminent organization of cattle grazers in California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry. Formed in 1917 as a non-profit trade association, the CCA promotes the interests of ranchers both large and small in California. The CCA has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The CCA represents its members' interests before the California State Legislature, Congress and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife

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1. No counsel for a party authorized this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief pursuant to Supreme Court Rule 37.2(a). The parties have consented to the filing of this brief.

management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

California is the third largest state in the union with almost 105 million acres of property. At 57 million acres, primary rangelands—meaning those lands suitable for the grazing of livestock—make up nearly 57% of California. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2010 ASSESSMENT 53 (2010). Forty-three percent of these 57 million acres are in private ownership. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2003 ASSESSMENT 67 (2003). Such private rangelands are found in every major geographic area of the State, with substantial ownerships along the California coast and in the Sierra foothills. *Id.* A map created by the California Department of Forestry and Fire indicates that at least 55 of California's 58 counties have private rangelands. While such rangelands account for a significant portion of California's area, they are not evenly distributed across the state. Much of the private rangeland is located in coastal regions subject to some of the state's most onerous planning and land use laws, including, of course, the California Coastal Act.

Owners of private rangeland are required to navigate the land use laws applicable to ranches that often consist of large-scale acreages sometimes stretching across multiple jurisdictions.[2] These rangelands are typically held for the purposes of a family business and have been in the

2. For example, the Bar One Ranch located in both Sierra and Plumas Counties totals 13,000 acres, the Nelson Ranch located in both Mariposa and Merced Counties totals 3,861 acres, and Roney Land and Cattle located in Butte, Tehama, Plumas, and Lassen Counties totals over 50,000 acres of private lands.

same family-operation for four or five generations. Shasta Ferranto *et al.*, *Forest and Rangeland Owners Value Land for Natural Amenities and As Financial Investment*, 65 CAL. AG. 184 (2011); STEPHANIE LARSON-PRAPLAN, CAL. RANGELANDS RESEARCH & INFO. CTR., HISTORY OF RANGELAND MANAGEMENT (2015).[3] For many ranches, the parcels have been acquired piecemeal over decades. LARSON-PRAPLAN, CAL. RANGELANDS RESEARCH & INFO. CTR., HISTORY OF RANGELAND MANAGEMENT (2015). While there may be common ownership among these parcels, the individual holdings have been acquired separately and are often noncontiguous. Particularly in mountain areas, a rancher's deeded land may be interspersed with other leased lands; loss of one key parcel may affect the operational functionality of a large area. Inconsistency in land use law and the "takings" doctrine, especially the "parcel as a whole" question, creates a minefield for these private landowners as well as uncertainty for local land use regulators when faced with such large property holdings.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing 325,000 member businesses in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses, including their rights with respect to ownership and operation of real estate. The National Federation of Independent Business, Small Business Legal Center ("NFIB SBLC") is a nonprofit,

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3. Online at http://californiarangeland.ucdavis.edu/History_of_Range_Management/.

public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Association of Home Builders ("NAHB") represents more than 140,000 members in 800 state and local associations. Since its founding in the early 1940s, NAHB has served as an important voice of America's housing industry. NAHB works to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing. Achieving that goal is increasingly difficult in today's contentious and unsettled legal environment. NAHB champions laws and regulations designed to preserve the value of the nation's housing stock, decrease the cost of rental housing, and facilitate economic recovery.

To fulfill their roles as the voices for small business and home builders, NFIB SBLC and NAHB frequently file amicus briefs in cases that will impact small businesses and housing. NFIB SBLC supports the Petition in this case because the "parcel as a whole doctrine" is of central concern in regulatory takings cases. The issue is of great practical concern for small business owners who happen to own one or more contiguous properties. When economic uses are severely restricted or prohibited with regard to one of those parcels, NFIB SBLC believes it is unfair to the landowner to view his or her separate legal parcels as a single economic unit for purpose the regulatory takings doctrine.

Similarly, NAHB supports the Petition in order to preserve the integrity of legally subdivided parcels which

are the cornerstone of the nation's real property system. NAHB's members are directly affected by the application of the "parcel as a whole" question. NAHB's members are property owners who engage in land development and construction activities that often occur at different times and in different phases. The viability of each of these phases is often determined by government regulation and economic conditions. It is not unusual for a developer to retain an interest in an individual parcel long after completing an adjacent development phase. Unfortunately, NAHB's members often face scenarios strikingly similar to those faced here—where parcels of separately deeded land are combined together for purposes of takings analysis. NAHB believes its homebuilder members would be greatly served if this Court grants the Petition and provides definitive guidance for land use agencies as to the "parcel as whole" doctrine.

SUMMARY OF ARGUMENT

The "parcel as a whole" concept is an important, but unresolved issue of takings law that should be defined in the context of adjoining parcels under single ownership. The CCA, NFIB and NAHB concur with Petitioners that determination of the relevant parcel of land subject to regulatory takings analysis should be clarified in order for agencies and courts to legally and equitably determine the extent of economic impact occasioned by restrictive land use regulation. The facts presented by this case, involving adjoining but legally separate parcels of property, provide the Court with the opportunity to address the issue in a context of great interest to California ranchers who may own large acreages acquired at different times and comprised of multiple legal parcels, as well as small

business owners and residential developers that acquire multiple parcels for their business operations, development activities, or investment plans.

ARGUMENT

I. THE WISCONSIN COURT OF APPEALS' DECISION ILLUSTRATES AN UNRESOLVED ISSUE IN FIFTH AMENDMENT TAKINGS LAW WHICH WARRANTS REVIEW.

The ruling below that two discrete lots, which are contiguous and happen to be owned by the same people, are subject to this Court's "parcel as a whole" doctrine from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130–31 (1978) illustrates an overly subjective, and potentially flawed, assessment of the "relevant parcel" for regulatory takings analysis. *See Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837 (Wis. Ct. App. 2011). But this determination results from no real fault by the Wisconsin Appellate Court. Rather it derives from conflicting and piecemeal judicial decisions ostensibly offering direction on how to define the denominator in the takings equation. This case provides an opportunity for the Court to resolve long-standing questions about the "relevant parcel" for takings analysis, at least in the case of contiguous owned properties.

Determination of the relevant parcel is a critical issue that controls the outcome of many takings claims. *See* Brief for Petitioners 11. This point has been acknowledged by many courts, including this one, as noted in the Petition. *Id.* at 11–12 (citations omitted). What constitutes the relevant parcel has often perplexed the U.S. Court

of Appeals. Explaining the "question" of the relevant parcel, the First Circuit states that "it is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, 'one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.'" *Palm Beach Isle Assocs. v. United States*, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) (quoting *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 48 U.S. 470, 497 (1987)).

As noted by Professor Eagle of George Mason School of Law, the circuit courts have adhered to a flexible, but factually nuanced, approach to defining the relevant parcel, *see, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), but that flexibility comes at a steep price to land use agencies, property owners and the courts. Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as the Whole*, 36 VT. L. REV. 549, 551 (2012). "Repeated admonitions to use the 'parcel as the whole,' however, do little to define the contours of that whole parcel in any particular case." *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006).

This flexible analysis is governed by parameters which ostensibly spring from *Penn Central*'s multi-factor approach to takings analysis. The Court of Federal Claims summarized those factors applicable to the relevant parcel as the following:

> (1) the degree of contiguity between property interests, (2) the dates of acquisition of property

> interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands.
>
> The court also stated that a sixth factor, 'the extent [to which] any earlier development had reached completion and closure' was also relevant to consideration in the relevant-parcel analysis.

Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as the Whole*, 36 VT. L. REV. 549, 569 (citing *Lost Tree Village Corp. v. United States*, 100 Fed Cl. 412, 428 (2011) (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d at 1381; *Lost Tree Village Corp. v. United States*, 92 Fed Cl. 711, 718 (2010))) (brackets in original). But while many cases have considered these factors, the inherent vagaries of flexibility and factual nuance frequently lead to conflict and confusion in the outcome. Courts are not required to accord the same weight or consideration to any respective factor. As such, disparate results arise that tend to cast doubt on the integrity of Fifth Amendment jurisprudence and lead to questions of the transparency of court decisions. As surmised by Professor Eagle,

> The idea that the rule under which one evaluates the facts is not a fixed one, but varies with the facts themselves, is apiece with the "ad-hockery" that makes it so difficult for lawyers to predict with any confidence what *Penn Central* means.

Id. at 566–567 (citing Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988) (noting the confusion caused by ad hoc factual inquiries in the current takings jurisprudence); Gideon Kramer, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 687 (2005)).

The *Murr* case provides a simple fact pattern which may lend itself to a multi-factor determination. But that simple factual context also provides this Court the opportunity to provide practical objective guidance on the appropriate weighting of those factors. As explained by Petitioners, the *Murr* facts lack the complexities of many regulatory takings cases which are confounded by such things a temporal considerations, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), geophysical factors, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 48 U.S. 470, 497 (1987), or eagle feathers *Andrus v. Allard*, 444 U.S. 51 (1979). Instead, this matter is simply a question of the regulation of two distinct parcels of residential property which are owned by one party and happen to be contiguous.

II. COURTS ARE IN CONFLICT ON APPLICATION OF THE "PARCEL AS A WHOLE" CONCEPT.

As illustrated in the Petition, inconsistent and contradictory approaches have been used by federal and state courts on the aggregation of parcels for Fifth Amendment takings analysis. *See* Brief for Petitioners 17–21. A number of the key federal cases in the area of takings

law have grown out of disputes arising in California.[4] This disparity of process and result illustrates that not only do property owners need clarity on the application of the "parcel of a whole" doctrine, but regulators and the courts do as well.

The CCA's members own and manage property in 55 of California's 58 counties. NFIB and NAHB's members own property in essentially every county in California and many other states as well. This means that California's ranchers, small business owners and home builders—all of whom may be directly affected by the "parcel as a whole" doctrine in current and future use of their properties—are regulated by no fewer than 55 different counties and a significantly greater number of cities in which such properties may lie. In addition to county and city jurisdictions, many California ranchers, business owners, and residential developers are subject to regulation by the California Coastal Commission ("Coastal Commission") for properties located in the coastal zone. As this Court knows, this state agency has regulatory authority over

4. Like many states, the California Constitution contains a "takings clause" that closely parallels the Fifth Amendment to the U.S. Constitution 's provision that "[N]or shall private property be taken for public use, without just compensation." Article I, Section 19 of the California Constitution provides in part: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." Despite a slight disparity in wording, California regulatory taking cases treat the state and federal takings provisions as essentially identical. As a result, in reviewing regulatory takings challenges under California's Constitution, California courts frequently rely upon U.S. Supreme Court decisions. *See, e.g., Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 858 (Cal. 1997); *San Remo Hotel v. City & Cty. of San Francisco*, 41 P.3d 87, 100–101 (Cal. 2002).

large swathes of privately owned lands, including some extensive rangelands, in Southern, Central and Northern California.

In the absence of judicially-directed consistency on this critical issue, property owners of contiguous properties may be subject to conflicting land use regulation from multiple agencies over a widely dispersed properties, or even be subject to conflicting regulatory interpretation on immediately contiguous parcels from different agencies. This potential disparity works not only to the detriment of the property owner, but also the land use agencies themselves who have no ability to act in concert in their interpretation of the parcel as a whole doctrine.

This disparity has not gone unnoticed by the courts. Just as inconsistency is illustrated in federal and state cases in Petitioner's Brief, California also presents examples of conflicting determinations. For example, in *Twain Harte Associates, Ltd. v. County of Tuolumne*, 265 Cal. Rptr. 737, 745–747 (Ct. App. 1990), the court found that two contiguous properties with common ownership would *not* be treated as a whole parcel for purposes of a takings analysis because of a zoning distinction. The court reached a similar conclusion in *Jefferson Street Ventures, LLC v. City of Indio*, 187 Cal. Rptr. 3d 155 (Ct. App. 2015) as well as *Aptos Seascape Corp. v. County of Santa Cruz*, 188 Cal. Rptr. 191 (Ct. App. 1982).

However, a California Appellate Court distinguished these earlier cases (*Harte* and *Aptos*) based upon the zoning distinctions and applied the parcel as a whole rule in *Ramona Convent of the Holy Names v. City of Alhambra*, 26 Cal. Rptr. 2d 140 (App. Ct. 1993). In that case the court

ruled in a regulatory takings dispute that the entire parcel of a school—19.17-acres—was the denominator in the takings equation, rather than the 1.97-acre parcel carved out for sale as a fundraiser. By further contrast, in *Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477 (App. Ct. 2007), the court looked through a spousal property transfer to determine that common ownership still existed and the "parcel as a whole" doctrine applied. Another court has found that the "whole parcel" is determined by looking at "(1) unity of title; (2) contiguity of the parcels; and (3) unity of use." *San Diego v. Neumann*, 863 P.2d 725, 730 (Cal. 1993). On its face the factors posed in *Neumann* pay lip service to elements of *Lost Tree Village Corp.*, but the court is clearly weighting "unity" as a key factor without justification or consideration of *Penn Central*'s key consideration of the "investment-backed expectations" of the property owner. *Penn Central*, 438 U.S. at 124.

State agencies such as the Coastal Commission are charged with furthering specific statutory tasks and goals for which they were created, but the takings doctrine must serve as a critical check on the agency's pursuit of those goals. While the Coastal Commission is authorized to "liberally" pursue its environmental mandate, at the same time the Coastal Act recognizes that the Commission is not authorized "to grant or deny a [coastal development] permit in a matter which will take or damage private property for public use, without payment of just compensation therefor." Cal. Pub. Res. Code § 30010.

Despite this restraint, the Coastal Commission recently advocated an expansive interpretation of the "parcel as a whole doctrine" to justify a limitation on real

property development. The "unity of ownership" theory was asserted in a California Coastal Commission Staff Report as grounds for the Coastal Commission's denial of development applications for five separate single-family residences in the Santa Monica Mountains above Malibu, California. CAL. COASTAL COMM'N, STAFF REPORT: REGULAR CALENDAR 82 (2010).[5] Despite evidence to the contrary, and without citation to supporting evidence, the Commission Staff Report disputed that the five parcels were separately owned, and asserted that the history and ownership structure of the parcels, and coordination in their development, provided evidence that "all of the parcels are actually owned" by a single person, *id.* at 80, which justified denying the development permits. S. CENT. COAST STAFF, CAL. COASTAL COMM'N, AGENDA ITEMS 13C-H (2011).[6]

This is but one example where this Court's resolution of the contiguous property "parcel as a whole" issue would assist in limiting confusion and overreaching conduct by government regulators.

III. CLARITY ON THE IMPORTANCE OF PROPERTY RIGHTS IS NEEDED

Granting the Petition allows the Court the opportunity to address a fundamental question of the overlap between real property law and land use regulation. As discussed above, the multi-factor approach to determining the

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5. Online at http://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf.

6. Online at http://www.coastal.ca.gov/meetings/mtg-mm11-6.html.

relevant parcel lacks objective standards to ensure uniformity in regulatory takings cases. This lack of objectivity has resulted in lower courts struggling to accurately define the relevant parcel. But this struggle further illustrates a more fundamental question regarding how to balance underlying property rights against the factors developed by the courts to either shrink or enlarge the property subject to the takings analysis. As noted by Professor Eagle,

> While courts have determined the relevant parcel to be larger or smaller, the baseline for 'parcel as a whole' remains the deeded parcel. Each legal parcel is a separate parcel for takings analysis, unless and until the facts indicate otherwise. 'To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, *the parcel in question.*'

See Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as the Whole*, 36 VT. L. REV. 549, 562 (2012) (citing *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993)) (emphasis added and citations omitted). In deference to legal rights conveyed with a legally subdivided parcel of property, Professor Eagle and others have suggested a more neutral approach to the relevant parcel analysis, "balancing the dangers of severance and agglomeration." *Id.* at 562 (2012); STEVEN J. EAGLE, REGULATORY TAKINGS, § 7-7(e)(5) (4th ed. 2009).

To date, and with no objective or systematic basis for their conclusion, "most courts entertain at least a strong presumption that all contiguous land held by a single

owner is to be treated as a single unified parcel." John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1031 (2003) (citing, *inter alia*, *District Intown Props. Ltd. v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)). Adopting such a "strong presumption" that disregards legally-created parcels goes to the heart of the conflict over weighting of long established property rights in the takings equation:

> It may be necessary to consider an owner's property as an undivided whole to avoid extreme results under the deprivation-of-all-use standard. To engage in such 'conceptual agglomeration' . . . however, is to violate the concept of property as a set of fungible entitlements. Large landowners are disadvantaged in their constitutional rights compared to small landowners for no apparent constitutional reason other than to find some limit to the regulatory takings doctrine.

STEVEN J. EAGLE, REGULATORY TAKINGS § 11-7(b)(2) (2d ed. 2001).

In light of these concerns about perceived subjectivity in defining the relevant parcel, the *amici* support the opportunity for the Court to consider the instant case. The Court can elucidate on the underlying deference to be shown to property rights as juxtaposed against the judicial factors utilized to define the relevant parcel.

CONCLUSION

For the foregoing reasons, *amici curiae* the California Cattlemen's Association, the National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders respectfully submit the Petition should be granted.

Respectfully submitted,

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September 17, 2015

Supreme Court, U.S.
FILED
APR 11 2016
OFFICE OF THE CLERK

No. 15-214

In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

JOINT APPENDIX

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Petition for Writ of Certiorari granted Jan. 15, 2016

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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Memorandum Decision and Order of the Circuit Court of St. Croix County (October, 31, 2013) B-1

Decision of the Court of Appeals of the State of Wisconsin, District III (Dec. 23, 2014) A-1

Order of Supreme Court of the State of Wisconsin, Denying Petition for Review (April 16, 2015) C-1

Chronological List of Relevant Docket Entries

Circuit Court of St. Croix County, State of Wisconsin

Joseph P. Murr, et al.

v. Case No. 12 CV 258

State of Wisconsin and St. Croix County

Dkt.	Date	Description
2	March 9, 2012	Complaint and Verified Petition for Inverse Condemnation Filed
18	June 28, 2013	Affidavit of Remzy D. Bitar
22	Aug. 1, 2013	Plaintiffs' Brief Opposing Summary Judgment, and Affidavit of Michael Waterman
31	Oct. 31, 2013	Memorandum Decision and Order of the Circuit Court of St. Croix County Filed
33	Nov. 19, 2013	Notice of Entry of Judgment of Circuit Court
49	Dec. 19, 2013	Notice of Appeal Filed in Circuit Court
58	Dec. 26, 2013	Motion for Reconsideration Denied

Chronological List of Relevant Docket Entries

Wisconsin Court of Appeals, District 3

Joseph P. Murr, et al.

v. Appeal No. 2013AP002828

State of Wisconsin

Dec. 26, 2013	Notice of Appeal and Court Record Filed
May 27, 2014	Brief of Appellants Filed
June 26, 2014	Brief of Respondent St. Croix County Filed
June 26, 2014	Brief of Respondent - State of Wisconsin Filed
July 15, 2014	Reply Brief of Appellant Filed
Oct. 7, 2014	Case Submitted on Briefs
Dec. 23, 2014	Opinion/Decision Filed
Jan. 28, 2015	Opinion Ordered Unpublished

Chronological List of Relevant Docket Entries

Wisconsin Supreme Court

Joseph P. Murr, et al.

v. Appeal No. 2013AP002828

State of Wisconsin

Jan. 21, 2015	Petition for Review Filed
April 16, 2015	Petition for Review Denied

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

COMPLAINT AND VERIFIED PETITION FOR CONDEMNATION

Case No. 12CV258
Condemnation Review: 30402

JOSEPH P. MURR
6722 Odell Ave South
Hastings, Minnesota 55033

MICHAEL W. MURR
699 Brentwood Drive
Eagan, Minnesota 55123

DONNA J. MURR
3718 Tamara Drive
Eau Claire, Wisconsin 54701

PEGGY M. HEAVER
3148 Crane Creek Place
Eagan, Minnesota 55121

Plaintiffs,

v.

STATE OF WISCONSIN
c/o its Attorney General
State Capitol Room 114 East
P.O. Box 7857
Madison, Wisconsin 53707-7857

ST. CROIX COUNTY
1101 Cannichael Road
Hudson, Wisconsin 54016,
Defendants.

The plaintiffs, by their undersigned counsel, complain against the State of Wisconsin and petition against St. Croix County pursuant to section 32.10 as follows:

Identity of the Parties

1) Plaintiff Joseph P. Murr is an adult individual residing at 6722 Odell Ave South, Hastings, Minnesota 55033.

2) Plaintiff Michael W. Murr is an adult individual residing at 699 Brentwood Drive, Eagan, Minnesota 55123.

3) Plaintiff Donna Murr is an adult individual residing at 3718 Tamara Drive, Eau Claire, Wisconsin 54701.

4) Plaintiff Peggy M. Heaver is an adult individual residing at 3148 Crane Creek Place, Eagan, Minnesota 55121.

5) Defendant State of Wisconsin is a sovereign entity represented by its Attorney General, Room 114 East, State Capitol, P.O. Box 7857, Madison, Wisconsin 53707-7857.

6) Defendant St. Croix County is a political body of the State of Wisconsin and it is organized under Chapter 59 of the Wisconsin Statutes. Its principal location and address is the St. Croix County Government Center, 1101 Carmichael Road, Hudson, Wisconsin 54016.

Description of the Properties

7) The Plaintiffs are the fee owners of residential property adjacent to the St. Croix River. The legal description for the property is attached as Exhibit A.

8) The Plaintiffs' property is located in the St. Croix Cove Subdivision.

9) The St. Croix Cove Subdivision plat was created in the 1950s.

10) The plat identifies the Plaintiffs' property as Lot E and Lot F. Each lot is approximately 1 1/4 acres.

11) The Plaintiffs' parents, William and Margaret Murr, acquired Lot F in 1960. Shortly afterwards, they built a cabin entirely within the boundaries of Lot F. Lot F was soon transferred to William Murr Plumbing, Inc.

12) The cabin on Lot F remains in existence today. It is used by the Plaintiffs as a family, summer cabin.

13) William and Margaret Murr acquired the adjacent Lot E in 1963. They acquired it as investment property with the intention of eventually developing it separate from Lot F or selling it to a third party, who would presumably develop it for him or herself. To this day, Lot E remains vacant.

14) In 1994, the cabin lot (Lot F) was transferred to the Plaintiffs. The vacant lot (Lot E) was transferred to the Plaintiffs in 1995.

15) Both lots have always been tax assessed as two individual residential, buildable lots.

Background on the Relevant Regulations

16) In response to an amendment to the Wild and Scenic River's Act (16 U.S.C. § 1271 et seq), the Wisconsin Legislature enacted section 30.27.

17) Section 30.27(2) directed the Wisconsin Department of Natural Resources (DNR) to adopt by rule guidelines and specific standards for riverway zoning ordinances for the banks, bluffs and bluff tops of the Lower St. Croix River.

18) Section 30.27(3) requires counties, cities, villages and towns to adopt riverway zoning that complies with the DNR's guidelines and standards.

19) Section 30.27(3) also permits the DNR to adopt an ordinance for a city, county, village or town if a city, county, village or town does not adopt a riverway zoning ordinance within the time prescribed, or the DNR determines that the ordinance that was adopted does not satisfy its requirements.

20) In response to section 30.27, the DNR adopted Administrative Code chapter NR 118.

21) In 1975, St. Croix County enacted the Lower St. Croix Riverway Ordinance. It was revised in 1977 to make it consistent with NR 118.

Facts Pertaining to the Taking of Land Without Compensation

22) In 2004, the Plaintiffs started working with the St. Croix County Zoning Department. The Plaintiffs desired to flood-proof the cabin on Lot F and sell Lot E as a buildable lot.

23) The zoning department determined that Lot E could not be sold or developed as a separate lot based

on Section 17.36.I.4, which mirrors Administrative Code section NR 118.08(4). These regulations prohibit the sale or development of adjacent lots in common ownership, unless each of the lots has at least one acre of net project area.

24) The zoning department concluded that because Lots E and F came under the common ownership of the Plaintiffs, each lot needed at least 1 acre of net project area in order to be separately sold or developed. Because the Plaintiffs' lots each had less than I acre of net project area, they could not be separately sold or developed, according to the county.

25) On behalf of herself and the rest of the Plaintiffs, Donna Murr filed papers with the Board of Adjustment seeking review of the zoning department's determination that the adjacent lots could not be separately sold or developed. She also sought several variances and special exception permits.

26) The DNR opposed Donna Murrs' requests.

27) In a decision dated June 28, 2006, the Board of Adjustment denied Donna Murrs' requests and affirmed the zoning department's determination that the Plaintiffs' lots could not be separately sold or developed.

28) Donna Murr commenced an action for certiorari review of the board's decision. The trial court affirmed that portion of the board's decision that relates to the sale and development of adjacent lots.

29) Donna Murr appealed the decision to the Wisconsin Court of Appeals.

30) The DNR entered an appeared in the court of appeals and filed briefs in support of the board's decision.

31) The board's decision was affirmed on appeal.

32) Donna Murr filed a petition for review with the Wisconsin Supreme Court. The court denied the petition for review on May 24, 2011.

33) The Plaintiffs have exhausted their administrative remedies and a final decision has been rendered regarding the application of the regulations to the Plaintiffs' property. The application of Ordinance section 17.36.I.4 and Administrative Code section NR 118.08(4) deprives the Plaintiffs of all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot. The only purpose for the lot is as a single-family, residential lot and without the ability to sell or develop it, the lot is rendered useless.

35) The lot cannot be put to alternative uses, such as agriculture or commerce due to its size, location and steep terrain.

36) Under ordinance section 17.36.1.4 and the county's determination, a single-family home cannot be built on Lot E, and the Claimants are prohibited from selling the lot. The Claimants are left stuck with a vacant lot that serves no purpose or use, and since it cannot be sold, it has no value.

37) The restrictions of ordinance section 17.37.1.4 and Administrative Code section NR 118.08(4) are excessive and the Defendants have therefore taken the Plaintiffs' land.

38) The Defendants have not provided just compensation for the taking.

39) The Plaintiffs served the Defendants with a Notice of Claim that demanded compensation for the taking of their land.

40) Defendant St. Croix County denied the claim, and the Plaintiffs were notified of the denial by a letter dated October 3, 2011.

41) Defendant State of Wisconsin did not issue a denial of the claim, but more than 120 days have passed since the State was served.

42) The actions of the Defendants constitute an uncompensated taking under Article 1, section 13 of the Wisconsin Constitution.

WHEREFORE, the plaintiffs request the following relief:

A. As against St. Croix County, relief pursuant to Wisconsin Statute section 32.10;

B. As against the State of Wisconsin, compensation for the taking as guaranteed by the Wisconsin Constitution.

C. As against both Defendants, costs, disbursements, attorney's fees and any other relief the court deems just and appropriate.

Dated: 3-9-12

MUDGE, PORTER, LUNDEEN & SEGUIN, S.C.
Attorneys for Plaintiffs

BY: s/ R. Michael Waterman
State Bar No. 1025674
Address
110 Second Street
PO Box 469

Hudson, Wisconsin 54016
(715) 386-3200

VERIFICATION
of Plaintiff Donna J. Murr

[Verifications omitted]

EXHIBIT "A"

PART OF LOT ONE (1) OF CERTIFIED SURVEY MAP IN VOLUME ONE (1) OF CERTIFIED SURVEY MAPS, PAGE 9, AS DOCUMENT NUMBER 258820, FILED IN ST. CROIX COUNTY REGISTER OF DEEDS OFFICE ON JULY 21, 1959, BEING A PARCEL OF LAND LOCATED IN GOVERNMENT LOT TWO (2), SECTION TWENTY FOUR (24), TOWNSHIP TWENTY EIGHT (28) NORTH, RANGE TWENTY (20) WEST, TOWN OF TROY, DESCRIBED AS FOLLOWS: From a point on the West line of said Section 24 which is a distance of 646.30 feet Nl 036'W of the West Quarter of said Section 24, go N89°41'E a distance of 225.0 feet to point of beginning; thence N4°20'W a distance of 522.97 feet; thence due East on a meander line a distance of 58.65 feet; thence S2°47'E a distance of 31.84 feet; thence S76°48'E a distance of31.97 feet; thence S5°44'E a distance of 486.20 feet to Cove Road; thence S89°4 l'W a distance of 100.00 feet along Cove Road to point of beginning; including all land between the meander line and Lake St. Croix.

ALSO, PART OF LOT ONE (1) OF CERTIFIED SURVEY MAP IN VOLUME ONE (1) OF CERTIFIED SURVEY MAPS, PAGE 9, AS DOCUMENT NUMBER 258820, FILED IN ST. CROIX COUNTY REGISTER OF DEEDS OFFICE ON JULY 21,1959, BEING A PARCEL OF LAND LOCATED IN GOVERNMENT

LOT TWO (2), SECTION TWENTY FOUR (24), TOWNSHIP TWENTY EIGHT (28) NORTH, RANGE TWENTY (20) WEST, TOWN OF TROY, DESCRIBED AS FOLLOWS:

Commencing on West line of said Section 24, 646.30 feet NI 036'W of West Quarter corner of said Section; thence N89°41 1E 325.00 feet; thence N5°44'W 378.59 feet to place of beginning; thence N5°44'W 107.61 feet; thence S76°48'E 50.00 feet; thence S5°44'E 66.77 feet; thence S56°46 'W 53.32 feet to place of beginning.

AND, PART OF GOVERNMENT LOT TWO (2) SECTION TWENTY FOUR (24), TOWNSHIP TWENTY EIGHT (28) NORTH, RANGE TWENTY (20) WEST, TOWN OF TROY, FURTHER DESCRIBED AS FOLLOWS: From a point on the West line of said Section 24 which is 646.30 feet NI 036'W of the West Quarter comer of said Section 24, go N89°4l 'E a distance of 125.00 feet to point of beginning; thence N4°20'W a distance of 523.50 feet; thence due East on a meander line a distance of 100.00 feet; thence S4°20'E a distance of 522.97 feet to Cove Road; thence 889°41 'W a distance of 100 feet along Cove Road to the point of beginning, including all land between the meander line and Lake St. Croix, NOW KNOWN AS LOT ONE (1) OF CERTIFIED SURVEY MAP IN VOLUME ONE (1), OF CERTIFIED SURVEY MAPS PAGE 10, AS DOCUMENT NUMBER 258940.

Together with and subject to easements as shown on said Certified Survey Maps.

St. Croix County, Wisconsin.

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

JOSEPH P. MURR, et al. Case No.: 12-CV-258

Plaintiffs,

v.

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

AFFIDAVIT OF SCOTT R. WILLIAMS

STATE OF WISCONSIN)
)SS.
COUNTY OF ST. CROIX)

SCOTT R. WILLIAMS, being first duly sworn on oath deposes and states as follows:

1. I am an adult resident of the State of Wisconsin. I make this affidavit, based on my own personal knowledge.

2. I am the president of Scott Williams Appraisal Inc. and a State of Wisconsin General Certified Real Estate Appraiser.

3. I inspected and appraised the real estate located at 202 Cove Court, Hudson, Wisconsin 54016-8031 on November 20, 2012.

4. Attached as Exhibit A is a true and correct copy of the report I prepared regarding the November 20, 2012 appraisal of the real estate located at 202 Cove Court, Hudson, Wisconsin 54016-8031.

Dated this 26th day of June, 2013.

BY s:/Scott R. Williams
SCOTT R. WILLIAMS
Scott Williams Appraisal Inc.

[Notarization Omitted]

Affidavit of Scott R. Williams, Exhibit A,
(Appraisal, dated January 28, 2013)
Certified Record Docket No. 17
Circuit Court of St. Croix County

January 28, 2013

Ms. Sara K. Beachy
Assistant Attorney General
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857

Mr. Remzy D. Bitar
Crivello Carlson, S.C.
The Empire Building
710 North Plankinton Avenue, Suite 500
Milwaukee, Wisconsin 53203

Re: An appraisal of a cabin 011 the St. Croix River, 202 Cove Court, Town of Troy, St Croix County, Wisconsin. Owners (in 2006): Thomas E. Murr, Michael W. Murr, Peggy M. Heaver, Joseph P. Murr, and Donna M. Murr. Our file#: 1529-12

Dear Ms. Beachy & Mr. Bitar:

In accordance with your request, I have appraised the above property and by virtue of my personal site visit and investigation herewith submit my opinion of the

Market Value of the fee simple property rights subject to the assumptions and limiting conditions. This appraisal cannot be completely understood without reading the *Assumptions and Limitations of Appraisal* section of this report; it should be thoroughly read and understood before relying on any of the information or analysis presented herein. This letter is part of the attached appraisal report and is invalid if used separately.

I inspected the subject property November 20, 2012. At the inspection were Attorney Sara Beachy representing the Wisconsin Department of Justice, Attorney Remzy Bitar representing St. Croix County, Attorney Michael Waterman representing the property owners, and two of the property owners.

Values Calculated as of June 28, 2006:

Two Lots Scenario	$771,100
One Lot Scenario	$698,300
Difference	$ 72,800

I, the undersigned, hereby certify that I have no interest in this property whatsoever, either present or prospective, and that my employment is not contingent in any way upon the amount of the value reported. I also certify that all of the information and analysis contained in this report is true to the best of my knowledge and belief.

Thank you very much for this opportunity to be of service. If there are any questions, please call or write to me at the above address.

Respectfully submitted,

SCOTT WILLIAMS APPRAISAL INC.

S/ Scott R. Williams

Scott R. Williams, MAI, SRA
Wisconsin Certified General Appraiser
Certificate # 1
Appraiser

jh

Location Map of Subject

West Troy

T28N • R20&19W

I. Property Data – "As Is" With One Buildable Lot

Property Identification

Location: The property is at the west end of Cove Court which provides access to the lower level of the subject property. The upper part of the subject property has frontage on Cove Road.

Frontage on St. Croix River
West of Highway F
About three miles south of Hudson
St. Croix County, Wisconsin

Address: 202 Cove Court
Hudson, Wisconsin 54016-8031

Owner: In 2006, the owners were as follows:
Michael W. Murr
Thomas E. Murr
Peggy M. Heaver
Joseph P. Murr
Donna J. Murr

Legal Description*

The property being appraised is part of Government Lot 2 in Section 24, Township 28 North, Range 20 West. A full legal description is shown in the addenda of this report as Exhibit E.

Title of Record

It is understood that this property has been in the Murr family since the early 1960's. According to a family member, the cabin was built in about 1961 by the parents of the current owners. Exhibit F in the addenda of this report shows a 1994 deed from the

parents (William F. Murr & Margaret D. Murr) to their children who at the time were as follows:

Michael W. Murr
Steven J. Murr
Thomas E. Murr
Peggy M. Heaver
Joseph P. Murr
Donna M. Timmons

The children took title as joint tenants and not tenants in common. The 1994 deed was for the east lot of the subject property. The 1994 deed was for the east lot of the subject property. In 1995; the west lot was conveyed from the parents to the same children. That deed is shown as Exhibit G in the addenda of this report.

In 2003, Steven J. Murr quit claimed his interest to the other Murr children. Donna M. Timmons is listed on the quit claim deed as n/k/a Donna J. Murr. This 2003 deed is shown as Exhibit H in the addenda of this report. It reflects the ownership situation as of the valuation date of this appraisal (June 28, 2006):

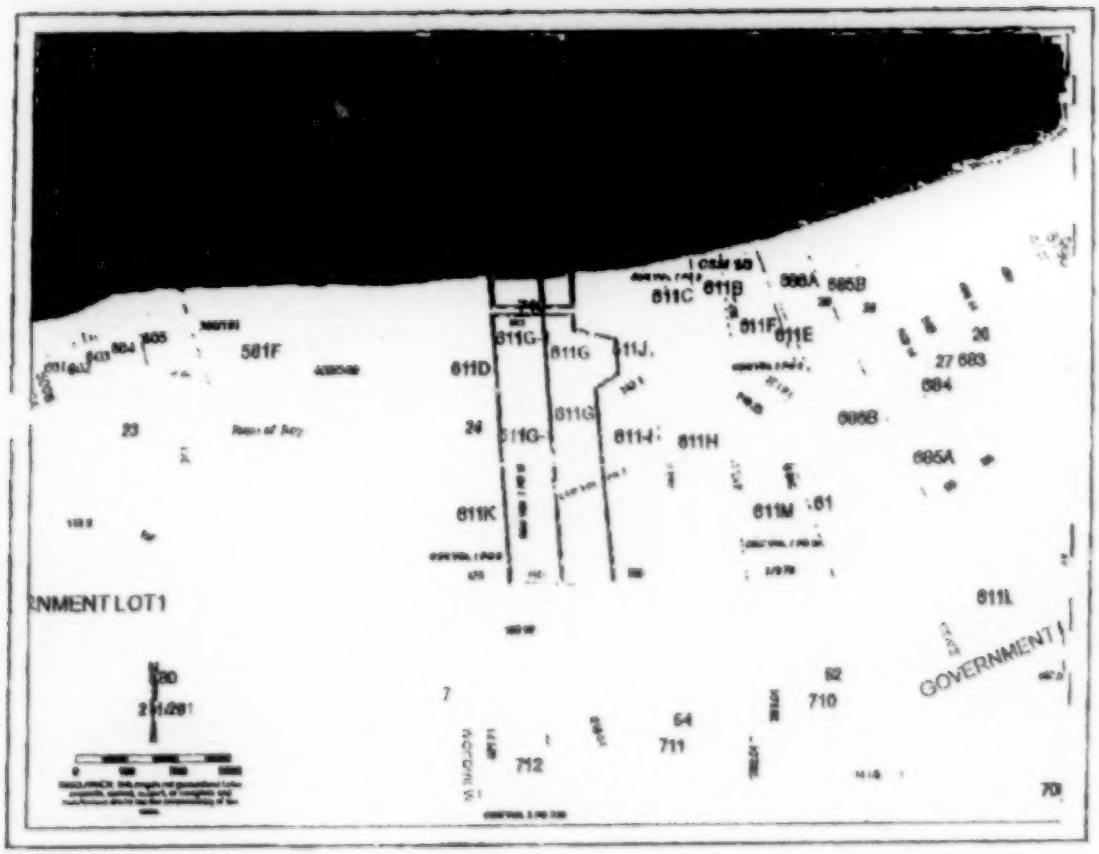
Michael W. Murr
Thomas E. Murr
Peggy M. Heaver
Joseph P. Murr
Donna J. Murr

More recently (in 2010, which is four years after the valuation date of this appraisal), Thomas E. Murr and his wife Gretchen M. Murr quit claimed their interest in the subject property to the remaining children. This results in the ownership situation today (in January 2013) with the owners being:

Michael W. Murr
Peggy M. Heaver
Joseph P. Murr
Donna J. Murr

* The legal description is believed to be correct, but its accuracy cannot be guaranteed. It should be verified by legal counsel before being used in a conveyance or legal document.

Tax Parcel Map Showing Subject



This transfer took place on March 11, 2010. The deed is shown as Exhibit "I" in the addenda of this report.

In 2011, a utility easement for telephone was granted and that is shown as Exhibit J in the addenda of this report.

Current Activity

I know of no current accepted offer to purchase (agreement of sale), option to purchase, or listing for sale of the subject property.

Tax Parcel Situation

The subject property is carried as two tax parcels in the St. Croix County records. They are as follows:

East Parcel: 040-1155-80-000

West Parcel: 040-1155-85-000

A Tax Parcel Map is shown on the opposite page. The west parcel of the subject property is marked 611 G-1 and the east parcel is marked 611 G.

In 2006, there were separate assessments on these two parcels. Starting in 2011, however, the assessments were combined under tax parcel 040-1155-80-000, but the subject property was still maintained as two separate tax parcels on the records. Exhibit K in the addenda of this report shows the 2006 property records from St. Croix County on these two parcels.

Background For This Appraisal

The Murr parents bought the cabin parcel of land in 1960, and a cabin was built on the property in about 1961. In 1963 the Murr parents bought the subject

west parcel of land. The small boathouse parcel (far east part of property and now merged with the subject east parcel) was bought in 1964.

In 1994 and 1995, the property was conveyed from the parents to the children and it has been used cooperatively by the children since then. The subject property has therefore been in the Murr family since the early 1960's. The children took title the same way (same grantee names) in both the 1994 and 1995 deeds.

The early surveys show the subject property as two lots, and it has continued to be shown as two lots up to the present. The property tax records also reflect that there were two lots and continue to reflect two lots through the end of 2012. As of January 1, 2011, however, the Assessor stopped putting separate values on each parcel and instead put all of the assessed value on the east parcel (040-1155-80-000).

In early 2006, the Murrs applied to the St. Croix County Board of Adjustment for eight variances and special exceptions concerning the subject property. First, they wanted a "variance to use two contiguous substandard lots in common ownership in the lower St. Croix River Way District as separate building sites pursuant to Section 17.36.I.4.a.1-3 of the St. Croix County Zoning Ordinance."

The other seven items related to a plan to solve the flooding problem of the subject cabin. Basically, the cabin was to be torn down and rebuilt a little further south at the base of the bank at a higher elevation. The variances and special exceptions were required to accomplish the proposed project since the cabin is in a highly regulated area called the "Lower St. Croix

Riverway Overlay District". The zoning regulations having to do with the Riverway Overlay District were enacted in July 1, 2005 and amended July 1, 2007, but this overlay district was a successor to the St. Croix River Valley District ordinance as amended January 1, 1976, 7/1/80, 10/1/96, and 2/15/2000.

-4-

The St. Croix County Board of Adjustment turned down all eight of the requested variances and special exceptions. That left the Murrs with one lot rather than two and meant that their proposal to cure the flood problems of the cabin could not go forward.

The Murrs appealed the decision of the St. Croix County Board of Adjustment to St. Croix County Circuit Court and then that decision was appealed to the District III Wisconsin Court of Appeals, which affirmed the Board of Adjustment decision. The Court of Appeals decision was in turn appealed to the State Supreme Court, but the Supreme Court decided not to hear the case. It is my understanding that the Court of Appeals decision dated and filed February 15, 2011 is therefore the final decision in this case.

Without getting involved in the details of the decision, the Court of Appeals basically affirmed the original decision of the St. Croix County Board of Adjustment so the Murrs own one lot since, for purposes of the zoning ordinance, the two substandard lots merged into one because title was taken under the same names in 1994 and 1995. In addition, since none of the variances or special exceptions were granted by the St. Croix County Board of Adjustment, it is not possible to flood proof the cabin by tearing it down and rebuilding

it further back into the base of the bank on higher ground as was proposed.

With regard specifically to the question of whether there are one or two buildable lots on the subject property, the zoning department cited Section 17.36.I.4.a.2 that deals with "substandard lots". It states: "Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area." In definition 135 of 17.09, net project area is defined as: "Developable land area minus slope preservation zones, flood plains, road rights-of-way, and wetlands." Both the east and west lots of the subject property have less than ½ acre of net project area so there is no separate salable lot.

In its decision dated June 28, 2006, the St. Croix County Board of Adjustment affirms the zoning department's determination that the subject property is only one lot and no separate buildable lot can be sold off. The Circuit Court and Court of Appeals also affirmed this determination. The Wisconsin Supreme Court denied a petition for review on May 24, 2011.

After the Supreme Court denied the petition for review, the Murrs made a claim against the State of Wisconsin and St. Croix County under the theory that a taking of the west lot had taken place. According to the subsequent lawsuit filed, St. Croix County denied the claim and the State of Wisconsin did not respond within 120 days. The Murrs then filed a lawsuit against the State of Wisconsin and St. Croix County for compensation for the alleged taking.

Our firm, Scott Williams Appraisal Inc., has been jointly retained by attorneys representing the State of

Wisconsin and St. Croix County to answer certain valuation and use questions concerning the subject property. Primarily, we have been asked to value the subject property as it existed on June 28, 2006 (the date of the St. Croix County Board of Adjustment decision referred to above) in "as is" condition. This means that the property would have had to comply with the zoning code and there would only be one buildable lot on the subject property.

We have also been asked to value the property with a hypothetical condition that there were two build able lots on the subject property as of June 28, 2006 with the west lot having 99.53' of river frontage and the east lot having 58.37' of river frontage. The purpose of valuing the property with the hypothetical condition is that it is then possible to determine a value difference between the two situations.

St. Croix Cove Plat Map Showing Subject

Land Description

Size

There have been four surveys of all or part of the subject property over the years. They are shown as Exhibits L through O respectively in the addenda of this report. Exhibits L and M are two surveys with the same date of July 18, 1959. Exhibit L includes all of the subject property plus other property to the east. Exhibit M surveys off the west 100' of the larger parcel shown in Exhibit L. Exhibit M is basically what is being called the west part of the subject property in this appraisal report.

Exhibit N is the third survey map dated October, 1959. It includes part of the east portion of the land surveyed in Exhibit L.

Exhibit "O" is the fourth survey map which is dated December 1, 2005. It appears to have been prepared for an application for special exceptions and variances that were requested by the Murr family in an effort to rebuild the cabin a little further back in order to elevate it and get it out of the flood area. The special exceptions and variances were denied so the project did not go forward. This 2005 survey appears to be the most comprehensive in showing the subject property as it existed June 28, 2006 and as it exists today in January of 2013.

The 2005 survey shown in Exhibit O in the addenda of this report divides the subject property into Parcel "A" and Parcel "B". Parcel A is the west parcel and Parcel B is the east parcel. According to the survey, Parcel A has 1.193 acres to the meander line and approximately

1.27 acres to the ordinary high water mark. Parcel B has 1.19 acres to the meander line and about 1.25 acres to the ordinary high water mark. The totals for Parcels A and B are 2.383 acres to the meander line and about 2.52 acres to the ordinary high water mark. The survey further indicates that Parcel A (west parcel) has 99.53' of St. Croix River frontage at the meander line and Parcel B has 58.37' of St Croix River frontage at the meander line. This results in a total river frontage of 157.90'.

Terrain

The subject property has upper level land along Cove Road at the top of the bluff. There is also lower level land along the river. Both of these portions of the subject property are relatively level. In between is a bank with a steep slope. The total drop is about 130'.

On the opposite page is a *St. Croix Cove Plat Map Showing Subject* with the subject property being designated "E" and "F". Some of the topographic lines are 10' apart and some are 20' apart. Tue elevations are shown on the lines. They indicate a total drop of about 130'.

Floodplain

Exhibit R in the addenda of this report is a Flood Hazards Map showing the subject property. The map shows that the upper level land and bluff slope is in an area of low flood risk. Most of the lower level land is in an area of high flood risk (floodway). There is a narrow strip of land at the foot of the bank that is an area of moderate flood risk. It is shaded in green on the map.

There are quite a few floodplain references in the paper work related to the 2006 zoning variances and special exceptions requests. According to the St. Croix County zoning office, the cabin on the subject property "is located within the floodplain of the St. Croix River, which is measured at the 100-year regional flood elevation of 691.6' mean sea level (MSL) . . .". The boundary between the floodway and the flood fringe is at the 10-year flood elevation of 687' MSL. The cabin ground elevation is 688' MSL so it is outside the flood way but within the flood fringe. The Ordinary High Water Mark (OHWM) is 682' MSL (shown on survey in Exhibit O in the addenda of this report).

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It is understood that the lower level land floods to a greater or lesser extent. The flood waters reach the cabin approximately every ten years on average. According to Tom Murr and Peggy Heaver, they can recall that the cabin flooded four times since 1960 (1965, 1969, 1997, and 2001). They said that the highest flood elevation was 5½' up the lower level walls of the cabin.

Soils

The upper level land has Gotham loamy fine sand with 2%-6% slopes. These are somewhat excessively drained soils formed in sandy deposits. According to the USDA/NRCS Soil Report, these soils have a "very limited" rating for septic tank absorption fields because of seepage in the bottom layer and filtering capacity.

The bluff bank land has Emmert loamy sand with 12%-35% slopes ("E" slopes). These are excessively drained soils formed in stratified sand and gravel. They are considered to be highly erodible for federal

farm programs. These soils are rated "very limited" for septic tank absorption fields because of seepage in the bottom layer, filtering capacity and slope.

The land in the lower level consists of Udifluvents. These are soils deposited by flooding. These soils are somewhat poorly drained to moderately well drained. It is saturated within 5' of the surface during wet periods. These soils are not rated for septic tank absorption fields since they are usually in areas that flood and are therefore not suitable for buildings or septic tank absorption fields.

Ground Cover

The property is completely wooded except for the beach. The upper level and bank have an attractive tree cover of oak and other hardwoods. The trees range from small to large, but they are typically medium to large. The lower level land is also wooded with willows and other miscellaneous hardwoods.

Water Frontage

The subject property has frontage on the St. Croix River (also known as Lake St. Croix in this area) as shown in the survey maps. The fourth survey map (2005) shown as Exhibit O in the addenda of this report shows meander line frontage of 99.53' for the west lot and 58.37' for the east lot, for a total of 157.9 front feet The survey shows an ordinary high water mark elevation of 682.0' and shows the 200' ordinary high water mark setback line which is approximately the upper level driveway that leads to the house west of the subject. The subject property faces north and has an excellent view looking up river. Since this is at a bend in the river, it is a long distance view.

The St. Croix River is wide and a major natural resource in this area. It is heavily developed for recreation and the frontage is heavily used for home sites. The subject beach is sand and small stones (mostly stoney) for the most part. The river has clear water. As indicated on the *Tax Parcel Map Showing Subject* on page 3 of this report and the *Aerial Photos of Subject & Neighborhood* shown as Exhibits P and Q in the addenda of this appraisal, there is an access strip that runs east-west along the subject frontage.

Access

The upper level land has frontage on Cove Road, a paved town road. Cove Court is a paved private road owned by the Winford Land Owners Association. Cove Court provides drivable access to the cabin and lower level land of the subject property. Cove Court is on a 30' wide easement. Cove Court is the primary access road for several cabins including the subject. Cove Court is posted "steep hill no winter traffic". According to the Murrs this is because the road would be unsafe and therefore the Owners Association has liability concerns. This means that the subject property is accessible only on foot and by snowmobile in the winter, and also possibly by all-terrain vehicle (ATV). It is not accessible by car in the winter.

* * * * *

A short distance after the unpaved private driveway continues from the end of Cove Court, there is a split and a lower level driveway leads to the subject cabin while an upper level driveway (a little higher than the cabin roof) runs westerly to the house on the adjoining lot west of the subject property. This upper level

driveway is a 30' wide access easement. This access easement is shown on the survey maps shown in Exhibits L, M and O in the addenda of this report.

Utilities

Electricity and telephone serve both the upper level land and the lower level land of the subject property including the cabin. There is natural gas in Cove Road that serves the upper level land, but there is no natural gas down Cove Court to serve the lower level land of the subject. The subject property uses LP gas and there is a tank on site. There is no municipal sewer and water in the neighborhood.

Easements

Please see the *Zoning, Easements, and Restrictions* section of this report The subject property has an east-west access easement driveway 30' wide that connects Cove Court to the house west of the subject property on the lower level land.

Homeowners Association

There is a "Winford Land Owners Association" that maintains a private beach (adjoining the northeast part of the subject property) and maintains the Cove Court access road. It is understood that the owners of the subject property are members of the Association.

Building Improvements

There is a cabin on the subject property as well as an outbuilding (boathouse).

Site Improvements

Site improvements are clustered around the cabin. They include an unpaved driveway and an LP gas

tank. In addition to the cabin's screen porch and covered concrete slab, there is a 1,639 sq.ft. concrete patio, a 3.5' high concrete block retaining wall between the cabin and boat house, and a stairway that leads from the patio to the land above the retaining wall.

Parts of the driveway have a low rock retaining wall along the east side (about 12" high). In addition, in places there is some rock set on the surface of the hill on the uphill side of the driveway to help with erosion control.

According to Tom Murr, the well is a sand point about 160' deep. He indicates that the water is clear and there is plenty of water. He said the water was tested in 2001 and tested safe. He also indicated that there is a two-tank system for sewerage. The first tank has no bottom and catches sludge. The second tank is a cesspool with round concrete block construction to allow the leaching out of the affluent. He indicated that the sewerage disposal system is in working order.

I noticed a pipe sticking out of the ground near the southeast corner of the building a little south of the building. I am not certain what is under the ground, but for purposes of this appraisal, it is assumed that what ever it is would not present environmental hazard that would create problems for the property.

* * * * *

combination storms and screens on the slide-by windows.

Roof

The roof has a slight pitch and is partly gable and partly shed style. Surface has rolled asphalt roofing. The roof has wood frame construction. There is about a 2' roof overhang with wood fascia and soffit. There are some gutters.

Other Comments

This property is built into a hillside. Under the typical residential categorization system, the cabin would have 723 sq. ft. of living area above grade (the upper level only). The lower level would be considered finished below grade. In practice, however, the entire north elevation and a small part of the east elevation are at to slightly above surrounding land grade on the lower level and there are lower level windows on all four sides. For purposes of this appraisal, both levels are considered to be living area.

There is a brick fireplace in the dining area. This is on an interior wall on the lower level, but the chimney continues on an exterior wall (north elevation) of the upper level. The exterior portions of the chimney are brick.

There is a 218 sq.ft. screen porch off the kitchen (on the river side) and a 100 sq.ft. covered concrete slab.

The subject cabin has been in the Murr family since it was built in about 1961. It is not winterized and has been used as a 3-season cabin. It is understood that the wood frame walls are insulated as is the roof. I am not sure as to the extent of the insulation (if any) on the lower level concrete block walls. It is understood that the crawl space is not insulated. The water pipe from the well to the cabin is above ground and is not insulated.

Construction quality on the cabin is pretty good for a 3-season structure. It probably could be winterized if a purchaser wanted to do it, but the lack of drivable access in the winter likely means that most purchasers would use the cabin as the Murrs have been using it

Overall, this building is in average condition. It appears to have been maintained, but many aspects are dated. The susceptibility to flooding, while it doesn't happen every year, is an ongoing issue. The Murr family wanted to elevate the building to eliminate the flooding problem, but they were unsuccessful in obtaining the permissions needed to execute the plan.

The problem appears to be that there are so many regulations affecting the lower level of the subject land that any substantial attempt to address the cabin flooding and location issue would be very time consuming and expensive to try to address. It could be very difficult to obtain permission and, in the end, success would be speculative at best.

Boathouse

The boathouse measures 20' x 26' for a total of 520 sq.ft. It appears to be about as old as the house and construction is similar.

It is a one story structure with a main room, three storage closets, and a half bath. It is built on a concrete slab. The main room has a concrete floor, unpainted concrete block walls for the exterior walls and knotty pine on the interior partition wall. The ceiling is insulation board in 4' x 8' sheets. There is wood trim and wood slide-by windows with aluminum storms and screens. There is also a large bank of windows on the west elevation.

* * * * *

Zoning, Easements and Restrictions

Parcels of real estate can have various legal restrictions on their use. These restrictions can come from government (such as zoning) or private parties (such as easements and deed restrictions).

Unless otherwise stated below it is an assumption of the value given in this report that no significant legal use restrictions exist, except zoning, that would significantly affect the value of the subject property.

Zoning

Land along the St. Croix River in this area is highly regulated. There are a number of aspects of the zoning code that affect the subject property. Some of the major sections are briefly commented on below.

The subject property is zoned Agricultural Residential with lower St. Croix River overlay, A zoning map is shown as Exhibit S in the addenda of this report.

Base Zoning

Section 17.15 .deals with the base zoning for Agricultural Residential District. It indicates permitted uses primarily of agricultural uses and "one single family dwelling". The minimum lot area "shall be an average of not less than two acres with a minimum lot area of 1½ (1.5) acres." Lots in cluster subdivisions authorized under an applicable town subdivision ordinance may have a minimum lot area of

one acre. The minimum lot size for a "conservative designed development" is ½ acre.

Side yard setbacks for single-family residences shall be not less than 25' in the aggregate and no single side yard shall be less than 10' wide. The maximum building height is 35' or 2½ stories, whichever is greater. For residential buildings, however, the height may be increased by not more than 10' or one story when all yards and other required open spaces are increased in width by 1' for each foot of height by which such building exceeds the normal height limit of 35'.

In addition to the agricultural and single family dwelling permitted uses, there is a fairly long list of "special exceptions" that "may be allowed within the Agricultural Residential District upon approval of the Board of Adjustment as provided in Subchapter VII. These special exceptions include two family dwellings and a long list of commercial uses.

Subchapter III.V, Section 17.36, Lower St. Croix River Overlay District

This district was enacted July 1, 2005 and amended July 1, 2007. The subject property is within this River Overlay District

There are no structures except docks, piers and wharves (which are subject to Wisconsin Department of Natural Resources Administrative Rules Standards and Army Corps of Engineers permit requirements) that are allowed without a land use permit from the St. Croix County Zoning Administrator. With a permit, single family residences and various governmental structures are permitted.

The minimum lot size is governed by the base-zoning district. However, there is a minimum net project area requirement of at least one acre for each lot. Net project area is defined as "developable land area minus slope preservation zones, flood plains, road rights-of-way, and wetlands."

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For the subject property, it appears that the only land that would count as net project area would be the land between the bluff line (line demarcating top of bluff as shown on the 2005 survey map in Exhibit "O" in the addenda of this report) and Cove Road. The net project area depth from Cove Road is marked on that survey at 158' and the total width of both lots together is 200'. This means that there is only about .73 acres of net project area land on the subject property or about .36 acres of net project area land per lot. The subject property can still be considered as one buildable lot according to the 7/15/11 Court of Appeals decision (Appeal No. 2008AP2728), presumably because it is grandfathered.

The minimum lot width in the River Overlay District is "200 feet measured at the building line and at the side of the lot nearest the river." With regard to density standards: "There may be no more than: one principal structure on each parcel."

The maximum structure height is 35'. Building structures shall be set back at least 200' from the ordinary high water mark of the lower St. Croix River.

There is a bluffline setback of "at least 100 feet from the bluffline in the rural residential management zone, and 200 feet from the bluffline in the conservation management zone. Structures that do not meet setback

may be permitted, however, if they are at least 40' from the bluffline and meet certain requirements.

There is a "slope preservation zone". The subject bank would appear to qualify as a slope preservation zone. "No structures, except docks, piers, wharves, structural erosion control measures, stairways, and lifts may be placed in slope preservation zones" and "no filling or grading is allowed in slope preservation zones that directly face and/or drain directly into the river. except the minimum required for installation of [these] items . . . ." Slopes greater than 12% may not be altered to become less than 12%.

There is a section on substandard lots which applies to lots of record in the Register of Deeds office on January. 1, 1976. These lots are buildable if various criteria are met. One of the criteria is "the lot is in separate ownership from abutting lands." This would appear to be a requirement that was not met when the Murr children took title to the two lots of the subject property in 1994 and 1995 since they took title under the same names for both lots.

Subchapter III, Shoreland Zoning 17.25-17.35

The subject property is subject to shoreland zoning. The subject property is subject to this section of the zoning code since it has frontage on the St. Croix River. With regard to minimum lot area: "Lot area shall be an average of not less than two (2) acres with a minimum lot area of 1½ (1.5) acres." Side yard requirements are an aggregate minimum width of 25' and a minimum width of one side yard of at least 10'. There is a water setback of 75' for buildings.

Subchapter IV, Section 17.40, Floodplain Overlay District

This section of the zoning code was enacted September 30, 2005. The subject property is in this district. It appears to deal primarily with those parts of the subject property that are in the flood plain. This includes the subject cabin which is located in the flood fringe. It does not appear that structures are allowed in the floodway. Uses permitted are generally open space type uses.

Structures do appear to be allowed in the flood fringe district (where the subject cabin is located), but there are a number of restrictions. One is that "the elevation of the lowest floor, excluding the basement or crawl way, shall be 2' or

more above regional flood elevation on fill. The fill shall be one foot or more above the regional flood elevation extending at least 15' beyond the limits of the structure."

Town of Troy Zoning

All of the zoning discussion above concerns county zoning. The Town of Troy also has zoning ordinances. The Town adopts county zoning: "Chapter 17 of the St. Croix County Zoning Ordinance is hereby adopted by reference and made the zoning ordinance of the Town of Troy, provided that the zoning restrictions and administrative provisions herein shall control over any similar provision of the county ordinance. The Town of Troy shall defer to St Croix County in the administration of this zoning ordinance, except in areas of additional zoning restrictions as set forth herein. In those situations, as to those provisions, the Town shall enforce all portions of its zoning ordinance."

The Town has a fairly extensive subdivision ordinance. In general, unsewered lots in subdivisions must have a minimum lot size of 2. 5 acres although a minimum lot size of two acres is available on "single splits".

There is also an extensive "Chapter 171: Lower St. Croix Riverway Zoning Ordinance". The "general standards" mostly seem to parallel the county ordinance. This is not surprising since the County ordinance is based on state law.

Conclusion

As can be seen in the brief summary above, the zoning provisions that affect the subject property are numerous and complex. It is my understanding, however, that the subject cabin can continue to be used "as is" on the site at its existing location.

The Murrs applied for a number of variances and special exceptions to enable the existing structure to be removed and a new structure built a little behind the existing structure (cabin) on a higher level. There were some changes to the building size requested. In the end, none of these variances and special exceptions were granted.

The Murrs also requested some type of variance or confirmation that they own two separate buildable lots that could be sold separately. In the end, this was not granted and the Court of Appeals specifically stated that, for zoning purposes, the subject property is one buildable lot.

Because of the complexity of the zoning in this area, it is essential that interested parties understand that the statements given in this appraisal report with regard to zoning may not take all of the complexities into

consideration since they are only brief summaries of isolated zoning points. Professionals such as St. Croix zoning office personnel, surveyors, engineers, or attorneys should be consulted before coming to any conclusions with regard to what is allowed for any specific proposed improvement project on the subject property.

Easements

There is a 30' wide driveway easement that connects Cove Court to the house west of the subject property on the lower level land. The easement runs east-west and is shown on the 2005 survey map included as Exhibit "O" in the addenda of this report.

Although not shown on the 2005 survey map, there is a trail or walking path shown on various maps and aerial photos including the *Tax Parcel Map Showing Subject* on page 3 of this report and aerial photos shown in Exhibit P and Q in the addenda of this report. It is my understanding that there are some properties that front on the St. Croix River further west of the subject property

that are accessed by this path. It is my understanding that larger vehicles such as cars and trucks are not permitted so this is not a driveway. For purposes of this appraisal, it is assumed that this is some type of a public or private thoroughfare and the owners of the subject property could not block its use.

Although subsequent to the valuation date shown in this report, Exhibit J is a 2011 utility easement for telephone that was granted. It is a strip of land 5' in width within a corridor along the existing private road

described in the document. There may also be other minor utility easements.

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II. Area and Neighborhood Analysis

Area Analysis

The property being appraised is located on Cove Road and Cove Court in the Town of Troy in St. Croix County, Wisconsin. This is in the Hudson area on the St. Croix River which forms the boundary between Wisconsin and Minnesota. The intensively developed part of the Twin Cities (Minneapolis/St. Paul) begins about five miles west of the subject property in Woodbury. The influence of the Twin Cities on population and real estate extends to the subject neighborhood.

A Demographic Analysis- Hudson Area chart is shown on the next page. As can be seen on the chart, the subject area both east and west of the St. Croix River is growing much faster than the country as a whole and also faster than either Wisconsin or Minnesota. The Town of Troy, for instance, grew 28.5% between 2000 and 2010. The City and Town of Hudson are growing even faster.

Those portions of Pierce County along the river from Prescott north are also growing faster than Wisconsin, Minnesota or the USA, but they are not growing as fast as the area to the north in St Croix County. The area directly across the river in Washington County is similar to the Pierce County river front lands.

Exhibit T in the addenda of this report shows a report from the Site To Do Business (STDB). This report is oriented in terms of drive times from the subject property and includes drive times of 10 minutes, -15 minutes, and 20 minutes. The drive time map with the three different areas is shown as the first page in Exhibit O. Most of the area covered is in Wisconsin since it is not possible to drive across the river except at the I-94 bridge.

The STDB report is current as of January, 2013 although the data is often a little older. It reflects a time beyond the 2006 valuation date for the subject property, but it is still interesting. It shows rapid population growth and an aging population. although probably no more so than the rest of the United States. Educational achievement is significantly higher than the USA with a little over 40% having a bachelors degree or higher compared with a 26.7% average for the United States as a whole.

Employment is slightly higher than for the United States, but the occupational status is seven percentage points higher white collar than the United States. The average commute time was 25.1 minutes which is about the same as for the United States as a whole. A significant number of people who live in this area commute into the Twin Cities. The median home value in the area is significantly higher than the United States average.

In 2010, about 32% of households had income over $100,000 per year, including 10% with incomes of greater than $150,000 per year.

Transportation in the area is good with Highway 1-94 running through Hudson. This is an east-west

interstate that connects the Twin Cities with Madison, Milwaukee and Chicago. Taking the Highway 29 exit east of Menominee leads to Eau Claire, Wausau and Green Bay. Highway F runs north-south and connects Hudson with Prescott.

St. Croix County has a land area of 722 square miles including 14 square miles of water. Population density is 117 people per square mile. The cost of living is slightly below the US average.

The average house hold size is 2.7 people which is a little lower than the 3 person average for Wisconsin. Median household income is $65,000 in the County compared with the Wisconsin average of $50,000 so the County is generally prosperous with much of the prosperity being concentrated along the river. The median house price is also significantly higher than in the State of Wisconsin as a whole.

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Demographic Analysis Hudson Area

	Population		
	2000	2010	Percent Increase
USA	281,421,906	308,745,538	9.7%
Wisconsin	5,363,675	5,686,986	6.0%
Minnesota	4,919,479	5,303,925	7.8%
Wisconsin			
St. Croix County	63,155	84,385	33.6%
Town of Troy	3,661	4,705	28.5%

Town of Hudson	6,213	8,461	36.2%
City of Hudson	8,775	12,719	44.9%
Totals except county	18,649	25,885	38.8%
Pierce County	36,804	41,019	11.5%
Town of Clifton	1,657	2,012	21.4%
City of Prescott	3,764	4,258	13.1%
City of River Falls	12,560	15,000	19.4%
Totals except county	17,981	21,270	18.3%
Minnesota			
Washington County	201,130	238,136	18.4%
Afton City	2,839	2,886	.7%
St. Marys Point	344	386	12.2%
Lakeland City	1,917	1,796	- 6.3%
Lake St. Croix Beach	1,140	1,051	- 7.8%
Lakeland Shores	355	311	- 12.4%
Denmark Township	1,348	2,886	114.1%
West Lakeland Township	3,547	4,046	14.1%
City of Hastings	18,204	22,172	21.8%
Totals			

except county	29,694	35,534	19.7%

Summary of Named Areas Within Counties

St. Croix County	18,649	25,885	38.8%
Pierce County	17,981	21,270	18.3%
Washington County	29,694	35,534	19.7%
Totals	66,324	82,689	24.7%

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Single family new house construction building permits in the County hit a peak of 1,208 in 2004 and have been declining ever since. In 2006, there were 561 permits for new houses. By 2009, the number had fallen to 119.

The City of Hudson is the county seat of St. Croix County. It had a 2010 population of about 13,000 and was experiencing rapid growth during the 2000-2010 period. The City of Hudson and Town of Hudson have a combined population of over 20,000 and form the major population center of St. Croix County.

With its strategic location a short distance from the twin Cities on both the St. Croix River and Highway I-94, Hudson's growth is expected to be significantly above state and national averages for the foreseeable future. It must be kept in mind that the I-94 bridge from Wisconsin into Minnesota is the most heavily traveled crossing point from Wisconsin into the states to the west.

Like St. Croix County, Hudson's median house prices are significantly higher than the Wisconsin state

averages, as is the household income. The workforce has excellent educational achievement. The manufacturing sector employs 16% of the population which is significantly below the Wisconsin state average. The workforce tends to be employed in white collar industries. Hudson is number 39 on the list of "Top 100 cities with highest median household income and median resident age less than 35." Over the years, Hudson has become more and more of a bedroom community for the Twin Cities.

In general, the economic base of this area is dependent upon the economic base of the Twin Cities since a significant number of people commute into the cities to work. There is ample land for expansion and it is not unusual to see good size subdivisions springing up in the rural locations along Highway F south of Hudson. The ability to easily commute into the cities on Highway I-94 gives this immediate area a significant advantage on drive time compared to any other location in western Wisconsin.

In general, the economy was doing well in 2006. There were a few economic storm clouds on the horizon, but relatively few people were concerned about them at the time. The official state date for the "Great Recession" was December, 2007. Both the local economy and the real estate market were doing well in 2006. Construction was beginning to slow, but was still fairly busy at that time.

Neighborhood Analysis

The upper level land of the subject property has frontage on Cove Road. A short distance west of the subject property, Cove Road ends and there is a 90

degree turn to the left where the road becomes Woodview Trail, which dead-ends a little over ½ mile south of where it turns off from Cove Road. Woodview Trail south of Cove Road has about seven houses on large lots. These are newer and very nice homes in the higher price ranges. East and west of the subject upper level land are also larger good quality homes, although not as new.

Cove Court is a private road that leads down to the lower level land of the subject property. This is a private road owned by the Winford Land Owners Association which also owns the beach at the northeast corner of the subject property. The beach actually takes a notch out of the subject property at its northeast corner and cuts down on the frontage of the east lot of the subject property.

The cabins on the lower part of Cove Court appear to be mostly like the cabin on the subject property in that they are probably used seasonally because they are older and would have the same winter access problems as the subject (because Cove Court is not open in the winter).

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Adjoining the west line of the subject property lower level is a somewhat newer high quality home—much higher quality than the subject or most of the other uses along the lower part of Cove Road. It appears to be a year-round structure although it probably is not used year-round because of the access problems on Cove Court.

In general, the subject property is part of a larger neighborhood of seasonal and year-round homes along the Wisconsin side of the St. Croix River. This is a

desirable neighborhood with many of the newer homes being high value. The river frontage, especially, is quite valuable and highly desired by purchasers.

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III. Objective and Scope of Appraisal

Highest And Best Use of Land Alone "As Is"

The Dictionary of Real Estate Appraisal defines the highest and best use of land or a site as though vacant as follows:

> "Among all reasonable, alternative uses, the use that yields the highest present land value, after payments are made for labor, capital, and coordination. The use of a property based on the assumption that the parcel of land is vacant or can be made vacant by demolishing any improvements."

Based upon the above considerations as well as the surrounding uses and economic factors of the Town of Troy area, the highest and best use of the subject land as if vacant would be for residential use as one lot. This use is consistent with current zoning, there is demand for this type of use in the market as of the valuation date, and the property is physically adaptable to this type of use.

The building site would be at the top of the bluff along Cove Road and not on the lower level accessible by Cove Court. The lower level land on the subject property is in flood plain and is not legally buildable for a number of reasons. It would not be possible to

build into the bank at the bottom of the bluff since this would be contrary to the slope preservation zone regulations. The only building site would therefore be at the top of the bluff.

• H&BU Land Alone "As Is": Residential With One Build able Lot

Highest and Best Use of Property As Currently Improved "As Is"

The Dictionary of Real Estate Appraisal defines the highest and best use of a property as improved as follows:

> "The use that should be made of a property as it exists. An existing property should be renovated or retained as long as it continues to contribute to the total market value of the property, or until the return from a new improvement would more than offset the cost of demolishing the existing building and constructing a new one."

Based upon the above considerations, as well as the surrounding uses and economic factors of the Town of Troy area, the highest and best use of the subject property as currently improved would be the present use of a cabin on the lower level land off Cove Court. It is understood that this use is grandfathered and therefore permitted although no substantial changes can be made without variances. Based on the decisions of the St. Croix County Board of Adjustment in regard to the Murr family's latest request for variances (and recent decisions by the County Circuit Court and the Court of Appeals on the case), it would seem that

variances along the lines of those requested would be difficult if not impossible to obtain.

In addition to being legally permitted as a grandfathered use, the property is physically adaptable for use as a cabin site and there is demand for this type of use. Although the cabin floods periodically (about every 10 years on the average) it is possible to clean up and fix up the property after the flooding so that it can again be used. The threat of flooding does adversely affect the contributory value of the cabin to the total value of the subject property, however.

Consideration was given to the question of what would happen, if anything, to the cabin if a large home would be built on the upper level of the subject property along Cove Road. While it would seem logical that the cabin could continue to be used as a guest house as long as it was not sold separately, it does not appear that would be permitted. According to the density standards in the Lower St. Croix Riverway Overlay District in 17.36.G.3.a, "There may be no more than one

principal structure on each parcel." Definition 159 defines principal structure as: "The main building or other structure on a lot that is utilized for the property's principal use. Principal structure includes attached garages and. porches." Definition 160 defines principal use as: "The primary purpose for which a lot or parcel is used."

In discussing the situation with the St. Croix County Zoning Office, they felt that the cabin could probably not continue as a guest house if a large home would be built at the top of the bank since then there might be two residential structures on the property. As to

whether modifications could be made to the cabin to make it into a beach house not used as a residential structure (along the lines of an elaborate gazebo), they were not sure. It might be possible to remove all the bedroom finish upstairs so that there would no longer be any bedrooms or make other building modifications that could meet the requirements.

Because of all of the regulations in the neighborhood, on complicated issues like this it is difficult to get a definitive answer without developing a plan and presenting it. To a casual reader, it would seem that the boathouse, patio and screen porch would not be defined as a principal residential structure so they might be safe. With the rest of the cabin, anything from complete demolition to light modification might be possible. If the interior finish were removed and the building were used for storage, however, it is hard to see how it could be defined as a principal structure.

It is difficult to forecast the exact plan a buyer might have for the subject property. I believe that a preponderance of buyers might want to put a large home on the top of the bank and use the improvements at the bottom as much as possible for recreational purposes. It would not be surprising, however, to find a purchaser interested in buying the entire lot who would continue to use the improvements at the bottom of the bank as the principal residential structure and forego building at the top of the bank on at least an interim basis. It must be kept in mind that the possibility would remain open to the purchaser at any time in the future and also open to subsequent buyers.

• H&BU As Improved "As Is": Residential With One Build able Lot

Reasonable Marketing and Exposure Time

USPAP Advisory Opinion 7 defines reasonable marketing time as follows:

> "An opinion of the amount of time it might take to sell a real or personal property interest at the concluded market value level during the period immediately after the effective date of an appraisal."

Estimated reasonable marketing time for the subject property is 6-12 months. Please note, however, that marketing time will vary depending upon subsequent events, and the presence or absence of specific buyers for this type of property at any given point in time.

According to our sale records, marketing times can vary from no time at all when an offer is made on a property that is not really for sale to over two years in situations where a buyer for the particular type of property is not available at that time. In addition, it takes time for a sale to be consummated due to examining whether the property is suitable for the particular purchaser and putting together an acceptable package to both parties. Based on this information, the average time for properties like the subject appears to be approximately 6-12 months.

- Reasonable Market Time: 6-12 Months

- 30 -

* * * * *

Summary of Values

	Number of Front Feet	Value Per Front Foot	Total Value	Rounded Value	Total
Land Values					
All of subject land as one lot	157.90	$4,000	$631,600	$631,600	$631,600
Subject land as two lots:					
East lot	58.37	$4,500	$262,665	$262,700	
West lot	99.53	$4,000	$398,120	398,100	
Total of subject land as two lots	157.90			$660,800	$660,800
Difference in land values					$ 29,200
Improved Values					
All of subject property as one lot	157.9			$698,300	
Subject property as two lots:					
East lot (including buildings)		58.37		$373,000	
West lot (land only)		99.53		398,100	
Total of subject property as two lots		157.9		$771,100	$771,100
Difference in property values					$72,800

Allocation of Improved Values

	One Lot	Two Lots	Difference
Land	$631,600	$660,800	$29,200
Improvements	66,700	110,300	43,600
Total	$698,300	$771,100	$72,800

IX. Summary and Value Conclusion

A *Summary of Values* chart is shown on the opposite page. It shows a summary of both land values and improved values with the differences calculated. There is also an allocation of improved values that breaks down both the one lot and two lot scenarios into land and improvements components. The differences are also shown.

The total difference in value between the one lot and two lot scenarios is $72,800.

When the St. Croix River Valley District, Subchapter III, Section 17.36 as amended on January 1, 1976 (and subsequently amended further) came into being, it merged adjoining substandard lots under the same ownership. The two subject lots were substandard, but under different ownerships at that time, even though they were both controlled by the Murr parents.

When the Murr children were given title to both lots in 1994 and 1995 under the same children's names, the two substandard lots were merged for purposes of the zoning ordinance. This was affirmed by the Court of Appeals. Merger meant that there was then one buildable lot, so there could no longer be two separate salable lots, each with its own building site.

This report valued the subject property under two scenarios: first that there is only one buildable lot, and second that there are two buildable lots with the division being as shown in the 2005 survey in Exhibit O in this appraisal report. The difference in value is as follows:

Two Lots Scenario	$771,100
One Lot Scenario	$698,300

Difference $ 72,800

- Difference Between One Lot & Two Lot Scenarios $72,800

Respectfully submitted,

SCOTT WILLIAMS APPRAISAL INC.

S/ Scott R. Williams

Scott R. Williams, MAI, SRA
Wisconsin Certified General Appraiser
Certificate #1
Appraiser

jh

Aerial Photo of Subject

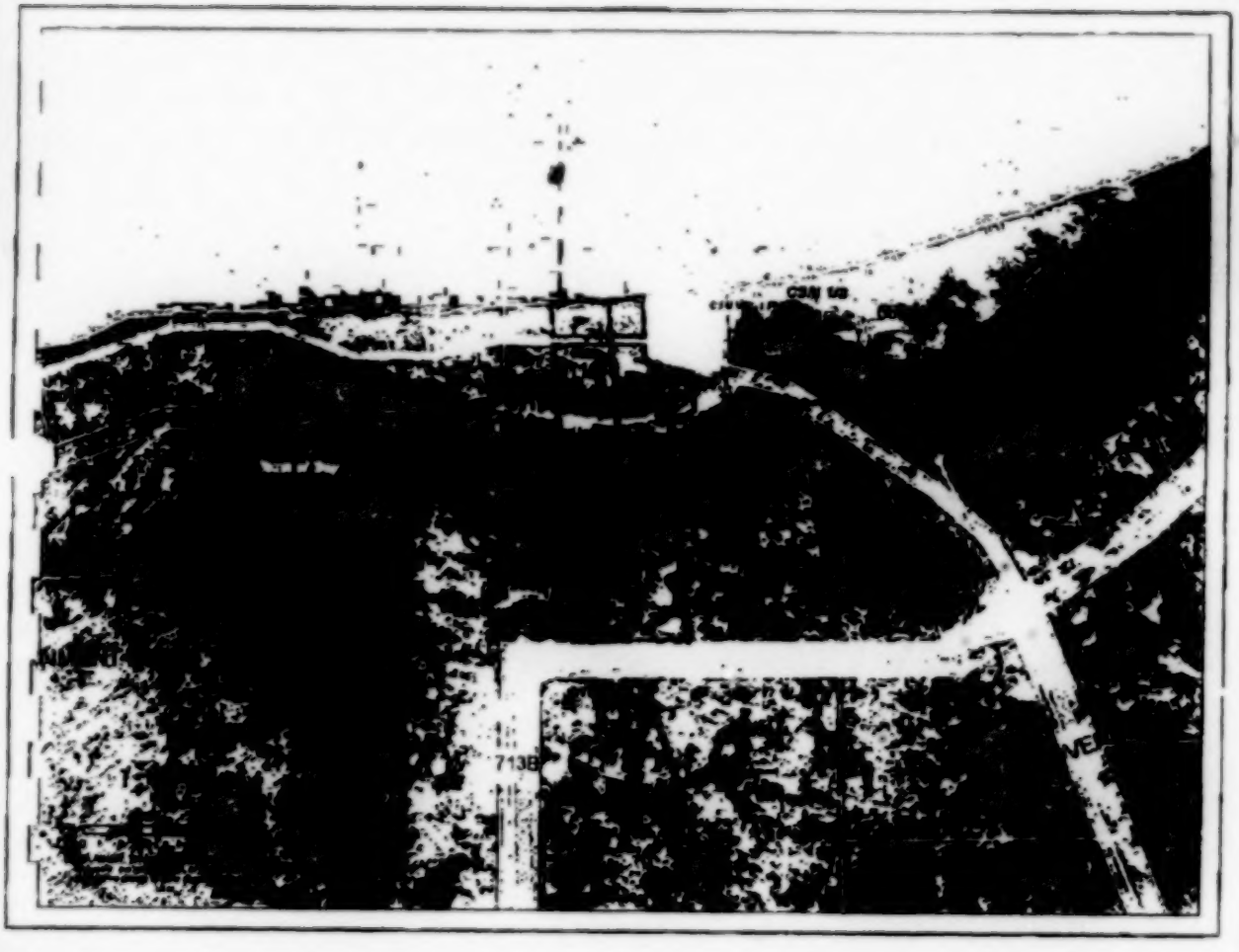


Exhibit P

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

JOSEPH P. MURR, et al. Case No.: 12-CV-258

Plaintiffs,

v.

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

Affidavit of Remzy Bitar, Exhibit I,
(St. Croix Board of Adjustment Decision, dated June 28, 2006) Certified Record Docket No. 18,
dated June 28, 2013

June 28, 2006 File Ref: SE0057

Donna Murr, Et Al

104 E Grant Avenue

Eau Claire, WI 54701

Re: St. Croix County Special Exception and Variance Requests Parcel #s: 24.28.20.611G, 24.28.20.611G-1, Town of Troy

Dear Ms. Murr:

The St. Croix County Board of Adjustment (Board) has reviewed the following special exception and variance

Requests for your property in the Lower St. Croix Riverway District in the Town of Troy:

Item #1: Variance to use two contiguous substandard los in common ownership in the Lower St. Croix Riverway District as separate building sites pursuant to Section 17.36 I.4.a.1-3 of the St. Croix County Zoning Ordinance.

Item #2: Variance to reconstruct and expand a nonconforming principal structure without using the same footprint as the original structure in the Lower St. Croix Riverway District pursuant to Section 17.36 I.2.e.1(g) of the St. Croix County Zoning Ordinance.

Item #3: Variance for filling and grading and placing a structure in the slope preservation zone (SPZ) in the Lower St. Croix Riverway District pursuant to Section 17.36 H.3.a-c of the St. Croix County Zoning Ordinance.

Item #4: Special exception request for filling and grading within 40 feed of the slope preservation zone (SPZ) in the Lower St. Croix Riverway District pursuant to Section 17.36 F.3.a.5 of the St. Croix County Zoning Ordinance.

Item #5: Special exception request for filling and grading in excess of 2000 square feet in the Shoreland District pursuant to Section 17.29 (2)(c)3 of the St. Croix County Zoning Ordinance.

Item #6: Variance to construct retaining walls and stairs that encroach within the OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

Item #7: Variance to construct a patio within the OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

Item #8: Variance to construct a deck within the OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

After the hearing on June 22, 2006 the Board voted to deny your application. The enclosed document is the formal decision regarding the application.

Sincerely,

Jennifer Shillcox
Landuse Specialist/Zoning Administrator

Enc: Decision

Cc: [Omitted]

FINDINGS, CONCLUSIONS, AND DECISION OF THE ZONING BOARD OF ADJUSTMENT ST. CROIX COUNTY, WISCONSIN

File: SE0057

Property Owner: Donna Murr, Et Al

Parcel ID #s: 24.28.20.61 1G, 24.28.20.61 1G-1

Complete Application Received: May 1, 2006

Hearing Notice Publication: Weeks of June 5 and 12, 2006

Hearing Date: June 22, 2006

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having heard all the testimony, considered the entire record herein, and reviewed the site the Board makes the following general findings of fact and conclusions of law relating to all requested special exceptions and variances (Items# 1 - #8):

1. The applicant is Donna Murr (Et Al), property owners, 8897 Campton Drive, Inver Grove Heights, MN 55076.

2. The address of the site is 202 Cove Road, River Falls, WI 54022.

3. The site is located in part of Gov. Lot 2, Section 24, T28N, R20W, Town of Troy, St. Croix County, WI.

4. The Town of Troy Planning Commission recommends approval of this project and proposes research on the use of contiguous substandard lots in common ownership. The Town Board has not acted on this request.

5. The Land & Water Conservation Department recommends denial of the project in its entirety due to negative environmental impacts.

6. The Wisconsin Department of Natural Resources recommends denial of the project in its entirety due to lack of a demonstrated hardship, failure to meet the spirit and intent of the Ordinance, and negative environmental impacts.

7. The Federal Emergency Management Agency has not submitted a recommendation on this project.

Item #1 (Substandard Lot) Findings and Conclusions:

The Board made the following findings of fact and conclusions of law pertinent to Item # 1:

8. The applicants filed an application with the Board of Adjustment for a variance to use two contiguous substandard lots in common ownership in the Lower St. Croix Riverway District to be developed and/or sold as separate building sites.

9. The lots have been in common ownership and used by the applicants' parents and now the applicants for over 40 years.

10. Denying this variance would not constitute a taking and would not constitute an unnecessary hardship because it would not deprive the applicants of reasonable use of their property since their contiguous substandard lots can be developed and sold jointly as a single, more conforming parcel that is more suitable for residential development.

11. The fact that the applicants have paid property taxes on both lots and plan to sell and develop one of the lots in the future does not constitute a hardship, which cannot be based solely on an economic gain or loss. Furthermore, property taxes are determined by the tax assessor and are independent of zoning.

12. Granting this variance would allow a use that is prohibited in the Lower St. Croix Riverway District.

13. Granting this variance would not meet the spirit and intent of the Lower St. Croix Riverway District, which limits the use of substandard lots for the purpose of reducing the adverse affects of overcrowding and poorly planned shoreline and bluff area

development. The Cove Court area was developed nearly 50 years ago and features some of the most crowded development in the Rural Residential Management Zone of the Riverway District. The shoreline currently features numerous residential and accessory structures, as well as piers and docks that are highly visible from the river. Many of the lots also have outdated sanitary systems due to their small size and the presence of the slope preservation zone and floodplain. Granting this variance could result in yet another residence with access to the river, additional tree cutting and excavating, and another sanitary system in an area with serious limiting factors. The resulting development would not meet several other purposes of the Riverway District, including preventing soil erosion and pollution and contamination of surface water and ground water; providing sufficient space on lots for sanitary facilities; minimizing flood damage; maintaining property values; and preserving and maintaining the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway in a manner consistent with the National Wild and Scenic Rivers Act and the Federal and Wisconsin Lower St. Croix River Acts.

14. Granting this variance is not consistent with the National Wild and Scenic Rivers Act, which was created to protect rivers, including the Lower St. Croix River, that, "*with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, and other similar values, and shall be preserved in free-flowing condition, and protected for the benefit and enjoyment of present and future generations*". The St. Croix River is a national treasure and one of the few rivers in the

United States that has regulations to protect its diverse scenic, recreational, and ecological values.

15. The applicants' lots, either separate or combined, do not have one acre of net project area and do not meet any of the other requirements for the use of substandard lots outlined in the St. Croix County Zoning Ordinance and in Wisconsin State Administrative Code NR 118, from which the County cannot be less restrictive.

16. The application of these standards in the Ordinance is not unique to this property since they apply to all substandard lots within the Riverway District, not just the applicants'. A variance is not necessary to secure to the applicants similar rights to neighboring landowners. At least eight other property owner s in the immediate Cove Court / Cove Road area own one or more contiguous substandard lots along the river with just one building site. Many of these contiguous lots are over two acres combined.

17. Denying this variance will not damage the rights or property values of other persons in the area since they are subject to the same rules and regulations as the applicants. The rules and regulations are intended 10 protect existing property owners and the general public from the adverse affects of overcrowding and poorly planned development in the Riverway District.

Item #2 (Reconstructlon and Expansion Outside of Footprint) Findings and Conclusions:

The Board made the following findings of fact and conclusions of law pertinent to Item #2:

18. The applicants filed an application with the Board of Adjustment for a variance to reconstruct and expand

a nonconforming principal structure without using the same footprint as the original structure in the Lower St. Croix Riverway District.

19. Literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have a compliant building site on their lot where they could construct a new residence that meets the requirements of all applicable overlay districts and could accommodate a sanitary system that meets today's stronger environmental standards. Additionally, the applicants have other options for floodproofing, improving, and expanding their existing residence in the same footprint without need for a variance. To provide safe access to the beach on the lot, the Ordinance allows stairways and lifts with a special exception permit.

20. Granting this variance would not meet the spirit and intent of the St. Croix Riverway District, the intent of which is to allow property owners to rebuild what they have in the same footprint, and at the same time reduce the adverse impacts of existing, poorly planned development. Although the proposed footprint to be located further back from the river and the floodplain than the original, it would require more filling and grading and tree removal in the sensitive shoreline area than floodproofing, improving, and expanding the existing structure on the original footprint. Unlike the original footprint, which is located approximately 10-20 feet from the base of the slope preservation zone, the proposed footprint extends approximately 30 feet into the slope preservation zone and will require a large amount of cutting and filling, which is prohibited in the Riverway District.

21. The Ordinance limits filling and grading associated with reconstructing or altering a nonconforming principal structure to only the minimum necessary to accomplish the reconstruction or alteration in compliance with other provisions of the Riverway District. Moving the footprint is not in compliance with the provisions of the Riverway District and will require additional filling and grading that will increase the negative environmental and visual impacts on the river.

22. Granting this variance could be contrary to the health, safety, or general welfare of the public. It could potentially be adverse to the value of the Opitz property to the west since the proposed residence would be located only ~ 10 feet from the existing shared driveway access, potentially making emergency vehicle access to Mr. Opitz's property more difficult. The existing driveway access is narrow due to the existing topography of the property.

Item #3 (Variance for Filling and Grading and Structures in the SPZ) Findings and Conclusions:

The Board made the following findings of fact and conclusions of law pertinent to Item #3:

23. The applicants filed an application with the Board of Adjustment for a variance for filling and grading and placing a structure in the slope preservation zone (SPZ) in the Lower St. Croix Riverway District pursuant to Section 17.36 H.3.a-c of St. Croix County Zoning Ordinance.

24. Literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have a compliant building site on their lot where they could construct a new residence that meets the

requirements of all applicable overlay districts and could accommodate a sanitary system that meets today's stronger environmental standards. Additionally, the applicants have other options for floodproofing, improving, and expanding their existing residence in the same footprint without need for a variance.

25. Granting this variance would not meet the spirit and intent of the St. Croix Riverway District. The intent of limiting activities and structures in the slope preservation zone is to prevent soil erosion; maintain property values; and preserve and maintain the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway in a manner consistent with the National Wild and Scenic Rivers Act and the Federal and Wisconsin Lower St. Croix River Acts. Unlike the original footprint, which is located approximately 10-20 feet from the base of the slope preservation zone, the proposed footprint extends into the slope preservation 20ne and will require a large amount of cutting and filling along slopes of approximately 25 percent. This type of activity at the base of a steep slope can cause severe erosion and slumping if not done properly, and if not permanently stabilized upon completion.

26. Granting this special exception could be contrary to the health, safety, or general welfare of the public, and could be substantially adverse to the property values of neighboring residents since the proposed cutting and filling at the base of a steep slope can cause severe erosion and slumping if not done properly, which in turn could potentially cause damage to the applicants' proposed residence, to developed adjacent

properties above the bluffline, and to the shared driveway leading to the Opitz propeny to the west.

Item #4 (Special Exception for Filling and Grading within 40 feet of the SPZ) Findings and Conclusions:

The Board made the following findings of fact and conclusions of law pertinent to Item #4:

27. The applicants filed an application with the Board of Adjustment for a special exception permit for filling and grading within 40 feet of the slope preservation zone (SPZ) in the Lower SL Croix Riverway District pursuant to Section 17.36 F.3.a.5 of St. Croix County Zoning Ordinance.

28. Granting this special exception would violate the spirit and intent of the Riverway District since the amount of fill and proposed cutting would increase the ground elevation by up to approximately six feet and change the topography, drainage, natural appearance, and ecology of the bluff and the shoreland area. It will also require the removal of several mature trees within the OHWM setback and could lead to damage of the remaining trees from excavating, filling, and construction activities, as well as a reduction of terrestrial near-shoreland habitat. Finally, the end result will be a residence that, while elevated to meet the floodplain standards, is much higher and potentially more visible from the river than what currently exists, thus detracting from the scenic and recreational value of the Lower St. Croix River Valley.

29. Granting this special exception permit would be contrary to the public health, safety, and general welfare and could be substantially adverse to property values in the neighborhood affected. While the

hydraulic analysis submitted by the applicants indicates that the fill will not increase the Regional Flood Elevation, it still has the potential to reduce the storage capacity of the floodplain and could potentially lead to increased flood damage on properties upstream and downstream.

Item #5 (Special Exception for Filling and Grading in the Shoreland) Findings and Conclusions:

The Board made the following findings of fact and conclusions of law pertinent to Item #5:

30. The applicants filed a special exception request for filling and grading in excess of 2000 square feet in the Shoreland District in order to elevate their new residence on fill as required in the Floodplain District.

31. Granting this special exception would violate the spirit and intent of the Shoreland District since the amount of fill would substantially increase the ground elevation in the shore land area. This will change the topography, drainage, natural appearance, and ecology of the shoreline. It will also require the removal of several mature trees within the OHWM setback and could lead to damage of the remaining trees from excavating and construction activities, as well as a reduction of terrestrial shoreland habitat. Finally, the end result will be a structure that, while elevated to meet the floodplain standards, is much higher and potentially more visible from the river than what currently exists, thus detracting from the scenic and recreational value of the Lower St. Croix River Valley.

32. Granting this special exception permit would be contrary to the public health, safety, and general welfare and potentially be adverse to property values

in the neighborhood affected. While the hydraulic analysis submitted by the applicants indicates that the fill will not increase the Regional Flood Elevation, it still has the potential to reduce the storage capacity of the floodplain (particularly when considering the cumulative impact of numerous fill projects in the floodplain of the river) and could potentially lead to increased flood damage on properties upstream and downstream.

33. It is not known whether or not the proposed fill can withstand flood pressures, depths, velocities, uplift and impact forces, and other regional flood factors. The wrong type of fill could wash out and potentially lead to greater negative environmental impacts and flood damage, which would not be in the public interest.

ZONING BOARD OF ADJUSTMENT

Signed: _____

Clarence W. Malick, Chairperson

Date Filed: 06/28/06

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

JOSEPH P. MURR, et al. Case No.: 12-CV-258

Plaintiffs,

v.

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

Plaintiffs' Brief Opposing Summary Judgment, and Affidavit of R. Michael Waterman, Certified Record Docket No. 22, dated Aug. 1, 2013

INTRODUCTION

The Plaintiffs brought this claim, alleging a regulatory taking of a vacant residential lot in the St. Croix Cove Subdivision, along the St. Croix River. They oppose summary judgment on multiple grounds, but essentially, there are material issues of disputed fact that are relevant to the taking of the Plaintiffs' lot. Evidence in the record shows that the Plaintiffs are prohibited from developing or selling their lot, rendering it without economic or beneficial value.

FACTS

A. History of the Property.

There is no dispute about the history of the property. The Plaintiffs own two, residential lots in the St. Croix Cove Subdivision along the St. Croix River in the Town of Troy. Lot F is improved with a cabin, and Lot E is vacant. The Plaintiffs' regulatory taking claim relates only to Lot E.

The lots were created in 1959 when the land was subdivided by two, certified survey maps. Lot F was created by a CSM recorded on July 21, 1959 in volume I of survey maps, page 10, document 258820. (Waterman aff. Exhibit A). Lot E was created by a CSM recorded on July 27, 1959 in volume I, page 10, document 258940. (Id. Exhibit B).

The Murr family acquired both lots in two separate transactions in the early 1960s before the enactment of zoning regulations along the St. Croix River. Plaintiffs' parents, William and Margaret Murr, acquired Lot F in 1960. Shortly afterwards, they built a cabin near the river, and then transferred title to their business, William Murr Plumbing, Inc.

After the cabin was built, the Murrs bought the adjacent Lot E in 1963. (Donna Murr dep. p. 17). The Murrs bought it as an investment and planned to one day construct a year-round retirement home on top of the bluff. (Donna Murr dep. pp. 17-18, 65, 139; Michael Murr dep. pp. 8-9). Lot E has never been improved and remains vacant to this day. (Donna Murr dep. p. 16).

In 1994, Lot F with the cabin was transferred to the Murrs' children: Joseph Murr, Michael Murr, Peggy Heaver, Donna Murr, Thomas Murr and Steven Murr.

The vacant Lot E was transferred to the children in 1995. (Donna Murr dep. p. 17). Subsequently, Thomas Murr and Steven Murr quit claimed their interests to their four other siblings.

(Donna Murr dep. p. 10). Those siblings are the current owners and are the Plaintiffs in this lawsuit.

B. Facts Related to the Regulatory Taking

The Plaintiffs and their parents had always planned on either developing Lot E for themselves or selling it to someone else. Lots E and F were tax assessed as separate, residential lots. (Peggy Heaver dep. pp. 14-15; Koski dep. pp. 8, 14-15). The tax assessor assessed Lot E with the assumption that it was a buildable lot, and assessed it accordingly. (Koski dep. p. 15).

Starting in 2004, the Plaintiffs started exploring the possibility of flood-proofing the cabin. (Donna Murr dep. p. 19). The cabin had suffered several floods of the St. Croix River, and there had been many near-floods that threatened the cabin. (Murr dep. pp. 50-51). The Plaintiffs explored numerous construction alternatives to flood-proof the cabin, all of which required variances and special exception permits. (Donna Murr dep. pp. 68-78). The Plaintiffs eventually submitted a plan and applied for several variances to construct the cabin on Lot F. (Donna Murr dep. p. 93).

The Plaintiffs' variance application also included a request to sell the adjacent Lot E. The Plaintiffs planned to use the proceeds of the sale to finance the construction on Lot F. (Donna Murr dep. pp. 20-21). However, Lot E does not meet the minimum lot size requirements of the zoning ordinance. Lot E has .5 acres of net project area, but ordinance requires 1 acre.

(ST CROIX COUNTY ORDINANCE 17.36.I.4; Sonnentag dep. pp. 38-39; Fodroczi dep. pp. 58-59). Because Lot E does not meet the code's size requirement and because it has common ownership with Lot F, the zoning ordinance prohibits the sale and development of Lot E as a separate parcel. (Sonnentag dep. pp. 24- 26, 45). The regulation reads:

I. NONCONFORMING USES AND STRUCTURES AND SUBSTANDARD LOTS

* * *

4. SUBSTANDARD LOTS

a. Lots of record in the Register Of Deeds office on January 1, 197 6 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

1) The lot is in separate ownership from abutting lands, or

2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

(ST. CROIX COUNTY ORDINANCE § 17.36.I.4; see also WIS. ADMIN CODE § NR 118.08(4) (emphasis added); see also Fodroczi dep. pp. 38-39).

The Board of Adjustment heard the variance application on June 22, 2006. On June 28, 2006, the board issued a written decision, denying the application in its entirety. (Fodroczi dep. pp. 40-41). Only the denial related to Lot E is relevant to this takings claim.

The board of adjustment's decision to deny the sale of Lot E was affirmed by the circuit court and court of appeals. (Fodroczi dep. pp. 48, 55-56). The Wisconsin Supreme Court denied a petition for review on May 24, 2011.

As a result of the board's denial and court decisions affirming the board, the Plaintiffs cannot sell or develop Lot E as a separate lot, and therefore, Lot E has no independent uses. (Sonnentag dep. pp. 50-51). Lot E is situated in a predominantly residential area, (Fodroczi dep. pp. 63-64) and was subdivided as a residential lot. However, a house cannot be constructed on Lot E because of the minimum lot size requirement. (Sonnentag dep. pp. 53-54). If not for the minimum lot size regulation, Lot E is developable. There is a building site for a single-family residence that meets the setback requirements. (Keith Heaver dep. pp. 21-22; see also Fodroczi dep. p. 63).

Other uses of land permitted by the zoning code are not feasible on Lot E. For example, Lot E cannot be used as a nature or wildlife conservancy because the lot is too small. (Sonnentag dep. p. 56). A small conservancy is 100 acres. (Fodroczi dep. p. 8), but Lot E is only 1 acre. Conservancy is unsuitable for Lot E because it is situated in an existing subdivision. (Sonnentag dep. p. 56). Agriculture and forestry uses are not feasible for the same reasons, and because of the lot's steep terrain. (Sonnentag dep. pp. 56-57;

Fodroczi dep. pp. 66-68). Uses as a public park, wayside, rest area, information area and scenic overlook would require dedication to an interested municipality, but such uses are unlikely because of Lot E's location in the middle of a residential subdivision. (Sonnentag dep. p. 58). David Fodroczi, the former Planning and Zoning Director for St. Croix County, was unable to identify any viable uses for Lot E without careful examination of the site and the ordinances. (Fodroczi dep. pp. 76-77).

Because Lot E cannot be developed as an independent lot, it only has use and value as "excess land" to the adjacent property owners. (Williamson dep. pp. 57, 63-64; Koski dep. pp. 16-17). Excess land is acreage that exceeds the minimum lot size but falls short of the acreage needed for two lots. (Williamson dep. p. 65). Excess land is 50 to 90% less valuable than land that can be independently developed. (Williamson dep. pp. 69-70; Koski dep. pp. 20-21). The tax assessor explained, " . . . we make huge reductions [in value] for excess land . . . because the excess land is you can't build or do anything on it in most cases." (Koski dep. p. 16).

Regarding the Murrs' Lot E, if it could be developed as a separate lot it was worth $410,000 as of June 28, 2006, the date the board of adjustment enforced the zoning code. (Williamson dep. p. 47). This value is comparable to the 2006 tax assessed value, which was $404,500. (Koski dep. pp. 13-14). Because Lot E cannot be independently developed, it only has value as excess land to an adjoining property owner. (Koski dep. p. 16). As excess land, the Plaintiffs' appraiser valued Lot E to be worth only $40,000. (Williamson dep. pp. 70, 75). The tax assessor reached a similar conclusion, valuing

it at $49,900. The assessor explained, " . . . that's what we feel it would be warranted for this value once we found out that it wasn't buildable and we'd have to com bine it [with Lot F]." (Koski dep. p. 17).

In 2011, after the litigation over the board of adjustment's decision was finished, the tax assessor combined the tax assessments for Lot E and F. (Koski dep. pp. 15-17). This was done because Lot E was determined to be unbuildable as a separate lot. (Koski dep. pp. 15-17). Referring to Lot E, the assessor explained, " . . . we call it excess land because it cannot be built on." (Koski dep. p. 16).

Plaintiffs commenced a takings claim because Lot E was subdivided and created to be a residential lot. Over the years, the Plaintiffs paid taxes for a buildable lot. The enforcement ofNR 118 and the corresponding county zoning ordinances prohibit the Plaintiffs from selling or developing Lot E. That leaves the Plaintiffs with no beneficial or economically viable use for Lot E, which led the Plaintiffs to asserting this regulatory taking claim.

ARGUMENTS

[Omitted]

CONCLUSION

Material issues of fact surround the taking of Lot E as alleged by the Plaintiffs. Therefore, summary judgment should be denied.

Dated: 8-1-13

MUDGE, PORTER, LUNDEEN & SEGUIN, S.C.

Attorneys for Plaintiffs

BY: s/ R. Michael Waterman
State Bar No. 1025674

[Counsel information omitted]

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

JOSEPH P. MURR, et al. Case No.: 12-CV-258

Plaintiffs,

v.

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' BRIEF OPPOSING SUMMARY JUDGMENT

STATE OF WISCONSIN }
ST. CROIX COUNTY }

R. Michael Waterman, first being duly sworn, deposes and says as follows:

1) I am an attorney with Mudge Porter Lundeen & Seguin, S.C., attorneys for the Plaintiffs. I submit this affidavit in opposition to the Defendants' motion for summary judgment.

2) Attached as Exhibit A is the Lot F certified survey map that was recorded on July 21, 1959 in volume 1 of survey maps, page 10, document 258820.

3) Attached as Exhibit B is the Lot F certified survey map that was recorded on July 27, 1959 in volume 1, page 10, document 258940.

4) Attached as Exhibit C is the deposition transcript of David Fodroczi.

5) Attached as Exhibit D is the deposition transcript of Donna Murr.

6) Attached as Exhibit E is the deposition transcript of Jon Sonnentag dated 03/11/13.

[list of exhibits not included
in Joint Appendix omitted]

* * * * *

11) Attached as Exhibit J is the deposition transcript of Timothy Williamson.

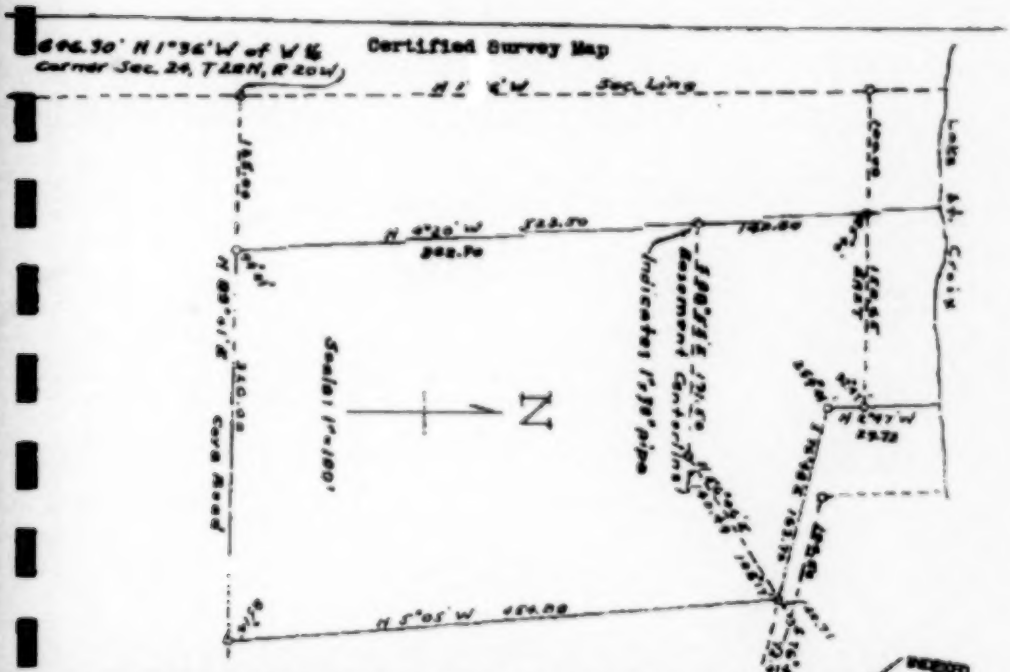
s/ R. Michael Waterman

Sworn and subscribed before
me this 1st day of August, 2013.

[notarization omitted]

1st Survey Map 7/18/59 (Vol. 1 Page 9)

Certified Survey Map



A parcel of land located in Gov. Lot 2, Sec. 24, T 28 N, R 20 W, further described as follows: from a point on the west line of said Sec. 24 which is 646.30 feet N 1°36' W of the west quarter corner of said Sec. 24, go E 89°41' E a distance of 125.00 feet to point of beginning for parcel to be conveyed herein: thence N 4°20' W a distance of 523.50 feet, thence due east on a meander line a distance of 158.65 feet, thence S 2°47' E a distance of 29.72 feet, thence S 76°48' E a distance of 165.70 feet, thence S 5°05' E a distance of 454.80 feet to Cove Road, thence S 89°41' W a distance of 320.00 feet along Cove Road to point of beginning, including all land between the meander line and Lake St. Croix and an easement for an access road 30 feet in width from Lake St. Croix to Cove Road as now opened and travelled as shown above. Parcel described above is subject to an easement for an access road 30 feet in width the centerline of which begins at a point on the west line of said parcel a distance of 382.70 feet N 4°20' W of the southwest corner thereof and extends S 88°55' E a distance of 191.50 feet, thence N 58°46' E a distance of 140.49 feet.

INDEXED

258820

REGISTER'S OFFICE, ST. CROIX CO., WIS.

Received for Record Wk. 21st day of July A.D. 1959 at 9:00 o'clock A. M. Recorded in Volume 1 of Survey Maps page 8

Register of Deeds

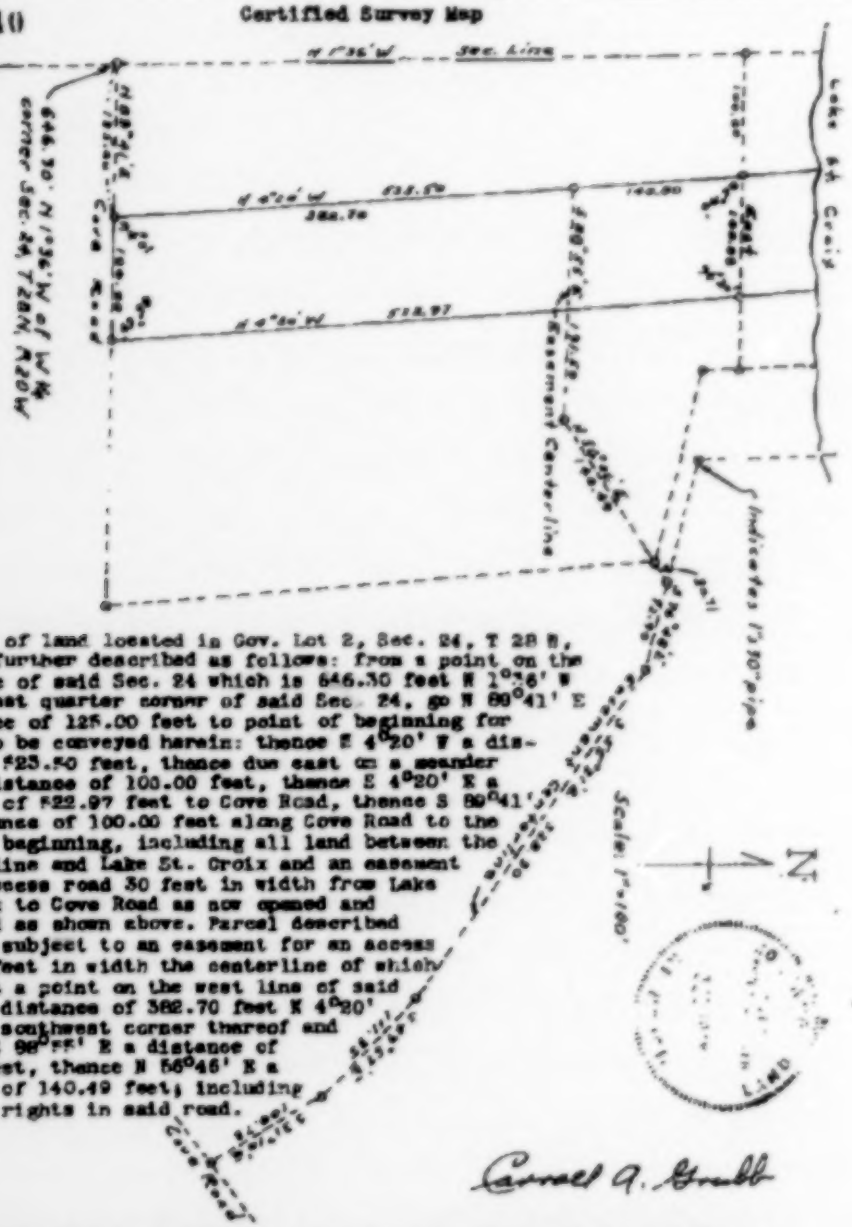
Carroll A. Grubb

I certify that the above is a true and correct map of the parcel surveyed mapped and described and that I have fully complied with the provisions of Sec. 236.34 of the Statutes. Surveyed July 18, 1959 for Winford, Inc.

This instrument prepared by Carroll A. Grubb, Reg. Land Surveyor

258940

Certified Survey Map



A parcel of land located in Gov. Lot 2, Sec. 24, T 28 N, R 20 W, further described as follows: from a point on the west line of said Sec. 24 which is 646.30 feet N 1°36' W of the west quarter corner of said Sec. 24, go N 89°41' E a distance of 125.00 feet to point of beginning for parcel to be conveyed herein: thence S 4°20' W a distance of 525.50 feet, thence due east on a meander line a distance of 100.00 feet, thence N 4°20' E a distance of 522.97 feet to Cove Road, thence S 89°41' W a distance of 100.00 feet along Cove Road to the point of beginning, including all land between the meander line and Lake St. Croix and an easement for an access road 30 feet in width from Lake St. Croix to Cove Road as now opened and travelled as shown above. Parcel described above is subject to an easement for an access road 30 feet in width the centerline of which begins at a point on the west line of said parcel a distance of 382.70 feet N 4°20' E of the southwest corner thereof and extends S 88°55' E a distance of 191.50 feet, thence N 56°46' E a distance of 140.49 feet; including easement rights in said road.

Carroll A. Grubb

I certify that the above is a true and correct map of the parcel surveyed, mapped and described and that I have fully complied with the provisions of Sec. 236.34 of the Statutes. Surveyed July 18, 1959, for Rohland H. Thommsen, Jr.
This instrument prepared by Carroll A. Grubb, Reg. Land Surveyor.

Exhibit C, Deposition of David Fodroczi,
dated Jan. 30, 2013 (excerpts),
Certified Record Docket No. 22,
Circuit Court of St. Croix County

* * * * *

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14 Q Okay. Subject to verification of the correct setback

15 distances, it would appear, just by looking at this

16 page of the exhibit, that that is what Ms. Shillcox

17 was trying to denote, the setback distances?

18 A Yes.

19 Q And, again, subjetct to those qualifications, again, it

20 would appear that there's at least an area within each

21 parcel where the setback distances would be met?

22 A Yes.

23 Q Assuming that the numbers are accurate?

24 A Yes.

25 Q Now, the Cove area, the Cove neighborhood, is all

Page 64

1 residential, correct?

2 A Largely, yes.

3 Q There's a farm field, I think, further to the -- to

4 the south, but along the river, it's all residential?

5 A Largely, yes.

6 Q Are you aware of any other uses besides residential

7 use in that Cove area along the river?

8 A Right on the river?

9 Q Yes.

10 A Generally, no.

* * * * *

Exhibit E, Deposition of Donna Murr,
dated Jan. 29, 2013 (excerpts),
Certified Record Docket No. 22,
Circuit Court of St. Croix County

* * * * *

Page 9

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Q Okay. How often does -- do you use the summer cabin?

A Well, I don't use it in the winter.

Q Okay.

A The road to gain access is not maintained, and I don't own a snowmobile or anything to help me get up and down the hill, so I don't use it at all in the winter.

During the summer months, depending on the weather and what I've got going on, I might use it every weekend.

I might use it one weekend a month. I use it a few

12 times in the fall. Usually take a week off during the

13 4th of July and spend the whole week out there each

14 year.

* * * * *

Page 17

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12 Q Before 1994, did your parents ever try to develop the

13 empty lot known as Lot E?

14 A No.

15 Q Did they ever tall about it?

16 A Yes.

17 Q What would they discuss?

18 A They would talk about building their retirement home

19 on top, on the bluff. They were going to build a

20 year-round home.

21 Q So the idea would be that they would have a retirement

22 home year-round on the top of the bluff and they would

23 still have the cabin at the bottom...

24 A Right.

25 Q --correct?

A They --

Q And the cabin would be used for summertime for the family?

A Yes. And they were going to divide the lot so it was an upper lot and a lower lot rather than two side by side lots.

Q And what type of retirement home would they build? Something --

A A single-family. I remember my mom talking about building a Spanish style home. I never really knew what that meant, but that's what her dream was. It wasn't intended to be a shared home like the cabin is. It was intended to be their -- their home.

Q So no vision that there would be multiple bedrooms for all the various family members?

A No, nothing -- well, no, I don't recall anything like

that.

Q And they would have also considered changing the parcel boundaries, is that what you said?

A Yes.

Q And how would they change -I guess what type of discussions did they have before 1994 about changing the boundaries?

A Well, because they wanted to build a home in I guess what would be described as in the middle of the two

Page 19

existing lots, so in order to do that, they would redraw the lot lines. My dad always called it redrawing the lot lines. Instead of splitting the lots, you're just-- instead of them going up and down, they would redraw the line in the middle of the bluff, so you have a one lot on the top of the bluff, so you could build a home right in the middle, and then the cabin would stay on the bottom where it is.

Q And did your father or mother ever approach the County or the State or the Town about redrawing the lot lines before 1994?

A Not that I am aware of.

Q So with regard to this property, is the first time that anyone from your family approached the County, the State, or the Town, would that have been in around late 2004, 2005?

A Yes.

Q And that would have been spearheaded, for lack of a better word, by you, correct?

A Spearheaded by me and my siblings.

* * * * *

Page 20

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A We went to the County to seek approval to do floodproofing on our cabin.

Q Okay.

A So we worked with them to develop a plan to floodproof.

As we were discussing amongst the family how we would
pay for the floodproofing, we decide that we could
fund the project by selling the adjacent lot, and it
was at that time when we mentioned it to the County,

Page 21

and they said, well, you can't sell that lot, and we
were quite flabbergasted.

Q So this would be the empty Lot E?

A Yes.

* * * * *

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Q And while I know that you disagree with the operation
of the regulations, do you have any disagreement with
the purpose and intent of the St. Croix River Valley
Ordinance?

MR. WATERMAN: As it's stated in this particular letter?

MR. BITAR: Yes, as it's stated in this

letter.

A I don't have any issues with that.

Q (By Mr. Bitar, continuing) It would be fair to say that these ordinances are meant to protect the environmental beauty of the area, correct?

A Yes.

Q And they serve to protect everybody's mutual interest in that scenic beauty, correct?

A Yes.

Q And you've certainly worked over the last few years with other regulations, such as the shoreland and floodplain regulations, correct?

A Yes.

Q And I don't expect you to have an understanding to the detail of what those mean, but what is your general understanding of the -- of the differences between the Lower St. Croix River Valley Ordinance versus the shoreland and floodplain regulations? Do you have any

understanding of the differences?

A Well, I mean. I've read through them. It's been a while. I think they're all basically trying to accomplish the same thing.

Q Okay. What is your best understanding of what those shoreland and floodplain regulations are trying to achieve?

A Well, the St. Croix River's a national scenic riverway. It's one of the cleanest rivers in the world. I think the main purpose is to maintain that, the scenic beauty of the river, so that people can enjoy it, whether they live on the river or they just want to use the river.

Q And the floodplain ordinances seek to achieve protection of people and property from flooding, correct?

A Well, I would say the floodplain ordinances are to protect those that are in the floodplain and to prevent

18 further development in areas that are prone to
19 flooding.
20 Q And do you have any disagreement with the underlying
21 purposes of the floodplain and shoreland ordinances?
22 A I don't have a problem with their purpose --
23 Q And you understand --
24 A -- as I understand it.
25 Q Okay. You understand that they have a purpose to try

Page 44

1 and protect the safety and welfare of people from
2 flooding, basically --
3 A Certainly.
4 Q -- correct?
5 A Yes.
6 Q And you don't have a disagreement with that, correct?
7 A No.
8 Q The Town of Troy is where your property is situated,
9 correct?
10 A That's right.

11 Q And the Town of Troy has its own riverway ordinance,

12 is that true?

13 A I believe they do.

14 Q Have you ever reviewed that ordinance?

15 A I'm sure that I have, but it's been a long time.

16 Q Okay. And what's your best understanding of what the

17 difference is, if any, between the --

18 A I don't know.

19 Q -- Troy ordinance and the County's ordinance?

20 A I couldn't tell you what the difference is. I think

21 the general purpose is probably very similar.

22 Q Okay. And do you have any disagreement with what the

23 Troy ordinance is trying to achieve?

24 A No.

* * * * *

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6 Q Okay. Do you know if any of your other neighbors have

7 ever gone before the Town Board for variances or

8 exceptions to build or modify their homes in the

riverway area?

A I know that Lyn Opitz next door would have gone before the Board, I had seen his name on prior Board minutes. He certainly needed to request variances. We were at a meeting that he--we received notice as a neighbor that he was going to be applying for variances, so we went to listen and see what he had in mind because he did completely tear down the existing structure and rebuild, so as neighbors, we wanted to know what he had in mind so he applied for and was granted every variance that I'm aware of because he was able to rebuild a nicer -- I guess be was able to rebuild.

Q The Opitz family generally stayed within their same footprint, isn't that true?

A Yes.

* * * * *

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Q And so was this the first time that you became aware of the various regulations that may apply to your property?

A If -- as I recall, this letter summarized conversations, so reading this letter would not have been the first time that I was aware of this. It more summarized what had been previously discussed or that I would have read on my own.

Q And when did you have those prior discussions? Would those have occurred in December 2004?

A That would be a fair estimate of the time.

Q So around December '04 when you filed these applications would have been around the time when you first began to realize what regulations applied to your land, correct?

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A I think that's fair.

* * * * *

Page 50

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Q Is this the first time that you or anyone in your family became aware of the particular flood elevations relative to your property?

A We were always pretty aware of the flood elevations having been flooded five times before this.

Q Okay.

A So we were very well aware of the flood elevations.

Q At some point today, we were going to get there, so we'll just do it now. Before 2005, how often had that property been flooded?

MR. WATERMAN: Can you be more specific?

MR. BITAR: Yeah.

Q (By Mr. Bitar, continuing) You just mentioned that it had been flooded about five times?

A Yes.

22 Q I guess how do you describe flooding?

23 A Well, the five times it was flooded is when we actually

24 filed a claim with our flood insurance --

25 Q Okay.

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1 A -- because there was water inside the cabin.

2 Q And who provided your flood insurance?

3 A It was through the National Flood Insurance Program.

4 Q Have you ever had private insurance?

5 A Well, we have private insurance that doesn't cover

6 floods.

7 Q So when you applied, you were applying to FEMA,

8 correct?

9 A Yes.

10 Q Okay. And you were applying on occasions where water

11 had actually entered the cabin, correct?

12 A That's right.

13 Q And these five occasions occurred before 2005, is that

14 correct?

15 A Yes, they all did.

16 Q What about since 2005, have there been flooding

17 occasions?

18 A There were two times where we sandbagged and we

19 boarded up the cabin and water did not actually enter

20 the cabin, so we were almost flooded two times since

21 then.

* * * * *

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21 Q And as I understand -- well, we'll get there. You've

22 also had an understanding since 2006 that steps could

23 be taken to floodproof the current cabin, correct?

24 A That steps could be taken to floodproof the current

25 cabin, yes.

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1 Q And have you ever had -- I know you've had those kind

2 of discussions with the County. Have you ever had

those discussions with FEMA about floodproofing that cabin?

A Yes.

Q Okay. And when did you have those kind of discussions?

A I made phone calls, so they've been phone conversations. I've gotten their brochures and their literature on how to floodproof and so on and so forth over the years.

Q Have you ever had anything in writing from FEMA in terms of what you could do to floodproof that cabin?

A Well, the brochure, which wasn't specific to our case, but it would lay out, you know, dormers that let the water come in and out or different options that may be possible in some areas, but some of the recommended ways of floodproofing may not be approved by the County.

(Deposition Exhibit 4 was marked for identification.)

Q (By Mr. Bitar, continuing) I'll show you Exhibit 4.

This is an April 28th, '05 letter to you from Jenny Shillcox. Have you seen this before?

A Yes.

Q And in this letter, it's following up on a meeting

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consideration to reconstructing within the same footprint, is that fair?

A Yes.

Q And why did your family not pursue that further?

A We felt there were better alternatives. Building

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on the existing footprint would require you to walk up a full flight of stairs to enter the main living area, where, currently, the main living area is on grade. Having three older brothers that are in their

'60s with various health issues, we didn't feel that was a prudent way to floodproof. It would limit their access.

It also would -- it would involve the lower level continuing to be flooded. Although the lower level would be uninhabitable, it would still be part of the structure. Having a lower level continue to be flooded would continue to have mold in the home. We wanted something that was never going to be flooded and that would be dry on all sides and in the basement. So we felt that a better alternative would be to move it father away from the river and on fill and out of the floodplain. We would preserve all the trees that are between the cabin and the river, making it more inconspicuous.

Q Would one option available to your family be to stay

within the footprint but to somehow raise the home,

whether on fill or pylons?

A Yes.

Q And has your family ever considered that?

A Yes.

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Q And can you tell me what you discussed as a family?

A Pretty much what I just stated, with the stairs being the main issue, going up a full flight of stairs to enter the property.

Q So there was some concerns with access, limited access --

A Yes.

Q -- due to the stairway?

A Yes.

Q Were there any- were there any other concerns the option of having pylons or fill raise the home but staying within the same footprint?

A Well, we kind of go back to the curb appeal, beach

appeal, we would literally be the only cabin that looks like that on the river, so it would actually, we felt, would make it look undesirable. It would -it would stand out more than it does now. It would look, in our opinion, like something you'd see on the Carolina coast versus the St. Croix River. We felt we could do a better job of making it look good from the river by moving it back and putting it on fill.

Q If you had the home on the same footprint but raising it with fill, would that lessen these concerns about curb appeal?

A It would lessen it, but we still felt that moving it

backwards, away from the river and on fill, would be even better. Bringing in fill on the footprint, we

would have to take out a lot of trees out in front,

mature trees.

* * * * *

Exhibit E, Deposition of Jon Sonnentag,
dated March 11, 2013 (excerpts),
Certified Record Docket No. 22,
Circuit Court of St. Croix County

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22 Q Okay. Is there any reason why the Murrs could not build

23 a home on the top of their bluff that straddles the two

24 lots?

25 A They should be able to.

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1 Q Why do you believe that?

2 A Because they have the existing parcel. This would be

3 all conditioned upon removing the cabin structure below

4 and more officially combining the two parcels. But once

5 that's accomplished, the setback requirements leaves an

envelope that you could fit a residence in. They would -- the standard setback in the riverway is a hundred feet, but you can go down to 40 feet. And that's very typical, provided they construct something that complies with the sub requirements for that.

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Q And when were these lots created, roughly?

A I think it was '50s or so. I'd have to, I guess, confirm that. That was my --

Q '50s or '60s?

A Yeah.

Q And when did the substandard lot provisions that we've been talking about today come into existence?

A 19 like '72 or 74 was probably the first significant zoning ordinance. And it may have existed - some of the shoreland provisions and lot requirements may have

existed at that lime. I would assume that that would
have been likely the time frame that they came about,
the ordinance requirements came about. There was some
subs, but other ordinances, right, I think like in the
early '80s that may not have been until then. But I
would assume'72 probably would have been the date.

Q Is it your understanding that the substandard lot

provisions specifically have been in existence since
around that time?

A I would assume so. I don't know that for sure, but I
know they definitely existed in the '80s. The
ordinances that were in the '80s, I'm just not certain
if that first one in '72 had it.

Q Those substandard lot provisions would have been in
existence in the 1990s when the Murrs -- when the lots

were conveyed to the Murrs, right?

A I would believe so, yes.

* * * * *

Exhibit J, Deposition of Timothy Williamson, dated January 19, 2013 (excerpts), Certified Record Docket No. 22, Circuit Court of St. Croix County

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Q Okay. And at the bottom of this page, you determine that the market value of the property as of June 28th, 2006, is 410,000, right?

A As a building lot, yes.

* * * * *

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Q In your opinion, the contributing value of the site as excess acreage is about $33,000 an acre, right?

A Correct.

Q And so you valued this property in the unbuildable
condition as $40,000, right?
A Correct.
Q What percentage diminution in value is that from your
first valuation of the site as a buildable lot?
A I would have to figure out the percentage, but it's

probably towards the higher range of 90 percent there,
close to that.
Q Can you do the math?
A I don't have a calculator, but it'd be close to 10
percent. Yeah, 10.25 is what I got.
Q So in your opinion, this property is worth 90 percent
less if it's non-buildable?
A Correct.
Q In your conclusion, you render a conclusion as the
contributing value of the site as excess acreage.
Contributing value to what?
A It could be as far as contributing value to the -- the

other parcel that has the cabin on it. Might look at a market value as far as you'd be limited as far as who would be interested in this property. Maybe one of the adjoining land owners would find that desireable to add to their -- their parcel, but as far as somebody just buying it, if you can't build on it, it's of little value to -- to most people.

* * * * *

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

JOSEPH P. MURR, et al. Case No.: 12-CV-258

Plaintiffs,

v.

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

Affidavit of Mateo Reginato, Exhibit J, Certified Record Docket No. 24, dated Aug. 26, 2013

From: Alex Blackburn
Sent: Tuesday, April 12, 2005 10:52 AM
To: Robert Bezek: Jennifer Shillcox
Subject: FW: Murr Property Ownership

Bob and Jenny.

Here is the land info. for Tom Murr.

Alex Blackburn

Saint Croix County Zoning Specialist

---Original Message---

From: Ken Rohlf [mail to:krohlf@levander.com]
Sent: Tuesday, April 12, 2005 10:48 AM
To: Alex Blackburn

Cc: donnamurr@comcast.net
Subject: Re: Murr Property Ownership

Alex:

Per your request, below please find the acquisitions/dates of the various Murr properties. I have also attached a file that contains a "picture" of the various properties.

1. April 1960 - House lot purchased by William and Margaret Murr from Thomssen

2. March 1961- House lot transferred by William and Margaret Murr to William Murr Plumbing, Inc.

3. 1963 - Vacant lot purchased by William and Margaret Murr from Glendenning

4. January 1964 - Boathouse lot purchased by William and Margaret Murr from McCarthy

5. January 1966 - Deed from 1963 purchase by William and Margaret Murr from Glendenning is recorded

It is my understanding that you intend to circulate this information to the County Attorney to render an opinion as to the applicability of the County's ordinances relative to the Murr Property and the potential developability of the Vacant Lot We look forward to receiving the opinion of the County Attorney at their very earliest convenience Should you have any questions or if I can be of additional assistance do not hesitate to contact me. As you know, the Murrs are very interested in moving

forward swiftly on this matter. I look forward to hearing from you shortly.

Since this is our first correspondece via email, please respond that you have received the email.

Thanks,

Kenneth J. Rohlf
LeVander, Gillen & Miller, P.A.
633 South Concord Street
Suite 400
South St. Paul MN 55075
Phone: (651)451-1831
fax: (651)450-7384

RECORD AND BRIEFS

No. 15-214

In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

PETITIONERS' BRIEF ON THE MERITS

JOHN M. GROEN
Counsel of Record
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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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OPINIONS BELOW

The decision below of the Court of Appeals of Wisconsin is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). The opinion is reproduced in the Petition Appendix (Pet. App.) at A-1.

The decision of the Circuit Court of St. Croix County is unreported and is reproduced in the Pet. App. at B-1.

The order of the Wisconsin Supreme Court denying a Petition For Review was issued April 16, 2015, and is reproduced in the Pet. App. at C-1.

JURISDICTION

The date of the decision being reviewed is December 23, 2014. The Wisconsin Supreme Court denied further review on April, 16, 2015. On June 30, 2015, this Court entered an order extending the time for filing a petition for writ of certiorari to and including August 14, 2015. The petition was filed on August 14, 2015, and granted on January 15, 2015.

Jurisdiction is conferred under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36, I.4.a. It is reproduced verbatim, in relevant part, in the Pet. App. at D-1. This ordinance is based on Wis. Admin. Code § NR 118.08(4).

STATEMENT OF THE CASE

This is an inverse condemnation case for the uncompensated taking of "Lot E." The subject parcel is a waterfront lot on the St. Croix River in the Town of Troy, Wisconsin. In this area, the river widens and is referred to as Lake St. Croix. The lake is a beautiful and popular recreation area, and features numerous homes along its shores. Joint Appendix (JA) 87. Minneapolis/St. Paul is nearby, with the intensely developed area beginning about five miles west of the parcel. JA 45.

The lake includes a large cove with over 40 waterfront residential parcels, known as the St. Croix

Cove Subdivision. JA 6. Lot E is part of this larger neighborhood of recreation and year-round homes. JA 51. This is a desirable neighborhood with many high value newer homes and waterfront parcels that are especially valuable and highly desired by purchasers. JA 52. Lot E is one of the waterfront lots that remains vacant and undeveloped. JA 89.

The Petitioners are Donna Murr, Joseph Murr, Michael Murr, and Peggy Heaver (collectively, the Murrs). They are siblings, and the owners of Lot E. JA 6.

A. Factual Background

1. Acquisition and Ownership of the Subject Parcel

The Murrs' story begins in 1960 when their parents purchased a parcel adjacent to Lot E. That other parcel is referred to as "Lot F." JA 6.

The Murrs' father was a plumber and he ran his own business, William Murr Plumbing, Inc. Presumably for tax reasons, he was advised to place title to the newly purchased Lot F in the name of the business entity, which he did. JA 6. Soon after purchasing Lot F, the Murrs' parents built a three bedroom recreational cabin consisting of approximately 950 square feet. JA 6. And so began a family legacy of enjoying many summers and weekends at the lake.

Recognizing the long-term potential of the area, the Murrs' parents decided in 1963 to purchase a second parcel, the above-mentioned Lot E. Lot E is immediately adjacent to Lot F. There is no dispute that they bought this adjacent Lot E for investment purposes. Pet. App. at A-3; JA 89. When the

investment ripened, they planned to either develop it themselves or sell it to a third party. Lot E has remained vacant and undeveloped to this day. JA 89.

Title to Lot E was in the Murrs' parents own names, rather than the plumbing company. Accordingly, while the Murrs' parents owned both Lot E and Lot F, the title was technically not in common ownership.

In 1994, the parents transferred title to Lot F (the cabin parcel) from the plumbing company to their six children. This was a gift to all of them; a way to keep the family legacy intact. JA 6, 20, 24 . A year later, in a separate conveyance in 1995, investment Lot E was transferred to the children. *Id.* Subsequently, two of the children quitclaimed their interests to their four siblings. *Id.* These four siblings are the current owners and the parties to this action.

Because of these conveyances from the parents to their children, the formal title to Lots E and F became placed in the same ownership, that is, both parcels are owned by the four siblings together.

2. Application of the Ordinance Precludes the Right to Sell or Develop Lot E

In 2004, the Murr family began exploring the possibility of upgrading the cabin, including elevating it to diminish the threat of flood. They planned to sell investment Lot E, and use the proceeds from the sale to fund their project. JA 7. However, when they spoke to County planning officials, they learned that because they owned both parcels, they could not sell Lot E without also selling Lot F. JA 8, 92. Under new

zoning regulations, the two parcels would be treated as one parcel.

In the words of Donna Murr, the family was "flabbergasted" to learn that regulations precluded separate use, development, and sale of Lot E. JA 93. Tax assessments had always been for two separate parcels, each assessed as individual residential, buildable sites. JA 6. There had been no procedure formally merging the two parcels. Nevertheless, they learned that zoning regulations adopted in 1975 treated the two parcels as one, and disallowed separate use or sale of Lot E.

Development or sale of Lot E was precluded by the 1975 regulations that required a "net project area" of at least one acre. Lot E is approximately 1.25 acres in overall size (JA 6), but the ordinance requires subtracting areas for slope preservation zones, floodplains, road rights-of-way, and wetlands, thereby yielding a net project area of 0.5 acres for development of Lot E. JA 26. While a half acre is plenty large enough for a house site, it is not large enough under the ordinance. Because the ordinance requires a minimum "net project area" of one acre, the parcel no longer meets the zoning requirements.

In short, when Lot E was created in 1959, and purchased in 1963, it was of sufficient size, width, and zoning to allow development of a single family house. Indeed, that is the use allowed for all the parcels within the St. Croix Cove Subdivision. However, because of the restrictions that came into place in 1975, the 1.25 acre parcel was defined as "substandard."

3. The "Grandfather Clause" Provided No Relief

When zoning regulations are changed, it is common to include a "grandfather clause" allowing the use of legal lots of record that pre-date the new regulations. The St. Croix County ordinance has just such a provision. Under the ordinance, a grandfather clause provides that any lot created prior to January 1, 1976, may still be developed as a legal building site even though it is considered substandard under the new regulations. Unfortunately, it was determined that this grandfather clause does not apply to the Murrs.

Although Lot E was a pre-existing and recorded lot of record, the protection of the grandfather clause only applies if the lot "is in separate ownership from abutting lands."[1] The ordinance states in relevant part:

> Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in *separate ownership from abutting lands*, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one

[1] St. Croix County Code of Ordinances § 17.36, I.4.a.1 (Pet. App. at D-1).

> acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.*

JA 77 (St. Croix County Code of Ordinances § 17.36, I.4.a.1) (italics added).

Of course, the Murr siblings own the abutting parcel, Lot F. Accordingly, although Lot E was a pre-existing lot of record, recorded on July 27, 1959 (JA 82), the grandfather clause would not provide relief.

Had anyone else owned Lot E, the grandfather clause would apply and that owner would be allowed to sell or build independent of Lot F. Despite being defined by the zoning restrictions as substandard, Lot E could still be sold or developed if it was owned by *anyone other than the Murr siblings*. But the Murrs are precluded from selling Lot E to anyone else, unless they sell both Lot E and Lot F together.[2]

The Murrs do not want to sell the cabin. They enjoy their family legacy and they want to improve the cabin and use it for many more years. JA 93. What they want is to sell Lot E, as they always believed they could.

B. Procedural Background

The Murrs sought relief from the ordinance by seeking a variance to allow the use or sale of Lot E as a separate building site. In support of their variance request, they argued that on January 1, 1976, the lots were still in separate ownership (split between the

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[2] *Id.* § 17.36, I.4.a.2 (Pet. App. at D-1).

plumbing company and the Murrs' parents), and therefore the grandfather clause should apply. The County Board of Adjustment rejected that interpretation of the ordinance and denied the variance. JA 8. The Murrs sought judicial review, but the variance denial was upheld. *Id.*

Having exhausted their administrative remedies, and after receipt of a final decision denying relief, the Murrs filed a complaint alleging an uncompensated taking of vacant Lot E. They contend that without the ability to separately sell or develop the lot, there is either a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (denial of all economically viable use), or a taking under the multi-factor analysis of *Penn Central*.

C. The Wisconsin Court Rejects the Murrs' Taking Claim by Defining the Relevant Parcel as Including Both Lots E and F

The Murrs allege a taking of only Lot E. In considering a taking claim, a court must evaluate the magnitude of government interference with the property interest alleged to be taken. But in order to measure the extent of government interference with private rights, a unit of property must be determined to be the "denominator" in that calculation. *See generally Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 497 (1987) ("one of the critical questions is determining how to define the unit of property" to be used as the denominator in that fraction). In other words, what is the relevant parcel for the government interference to be measured against?

The Wisconsin court recognized that defining the relevant parcel was central to analyzing the taking claim. The Murrs argued that the relevant parcel for takings analysis purposes is investment Lot E, and only Lot E. They did not claim a taking of Lot F. In contrast, the government defendants argued that for purposes of analyzing the extent of government interference with Lot E, the relevant parcel was Lot E *combined with* Lot F.

The Wisconsin appellate court ruled that because the two lots are contiguous, and happen to be owned by the same people, this Court's "parcel as a whole" rule from *Penn Central* requires combining the two parcels for takings analysis. As stated below:

> "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole** . . . .'" (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

Pet. App. at A-10 ¶ 18 (quoting *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996) (emphasis added).

From the Murrs' perspective, Lots E and F are two separate parcels, created as legally separate lots, taxed separately, and purchased separately. The lots were never developed together, and were purchased for completely different reasons. Nevertheless, because

the Murrs own both parcels, the Wisconsin court ruled that these two parcels combined were the Murrs' "parcel as a whole." This conclusion was driven by the contiguous ownership.

> There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, **contiguousness is the key fact** . . . .

Pet. App. at A-10 ¶ 19 (emphasis added). The court repeated again that this Court "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." Accordingly, the court below concluded by proclaiming

> a well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

Pet. App. at A-11 ¶ 20 (emphasis added).

Given this analysis of *Penn Central*, the Wisconsin court found there was no taking because, *combined with Lot F*, the Murrs still had one building site.

> With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a single, buildable lot under the ordinance. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes.

Pet. App. at A-12 ¶ 22. Based on this rationale, the court below concluded as a matter of law that the Murrs have not alleged a compensable taking. *Id.*

SUMMARY OF ARGUMENT

In establishing the "parcel as a whole" rule, *Penn Central* focused on the single parcel, the Grand Central Terminal. The Court rejected the theory that the Terminal parcel should be segmented into discrete interests, *i.e.*, the air rights, and found a taking of the air rights alone. The decision thus rejected the "segmentation" theory offered by the railroad company, and instead ruled that the takings analysis focuses on the parcel as a whole.

Nor did the Court in *Penn Central* measure the extent of interference with the Terminal parcel by aggregating the company's other real estate holdings into the equation. Although the company owned substantial properties that were directly benefitted by operation of the Terminal, "aggregation" of those parcels into the takings equation was not accepted. The Court subsequently stated that such aggregation of parcels is an extreme and unsupportable approach to the takings analysis.

This Court's takings jurisprudence thus rejects both extremes, neither segmentation nor aggregation of parcels has garnered support. Rather, the Court has preferred the middle ground where the parcel as a whole is defined as the entire fee estate for the single parcel. This standard rule should be applied to the Murrs' single parcel, Lot E, for determining whether the extent of interference with that parcel is a compensable taking.

The standard presumption derived from *Penn Central* is that the magnitude of government interference in a takings claim should be measured against the fee title of the single parcel alleged to be taken. This presumption is grounded in *Penn Central* and long established principles of property law. It is also consistent with normal understandings in the real world. Moreover, as a presumption, the flexibility is maintained for a party to demonstrate that, in the particular case, fairness and justice are better achieved by segmentation or aggregation of parcels. But the burden of proof should be on the party asserting either of those more extreme positions.

Under the facts of this case, there is no reason to deviate from *Penn Central*. Although the Murrs own two parcels that happen to be adjacent, those parcels were purchased at different times, for different purposes, and have never been considered as a single economic unit or jointly developed. Absent the effect of the challenged ordinance, the Murrs' rights in Lot E are separate and distinct from Lot F. Their alleged taking should focus on the fee interest of the single parcel, just as this Court held in *Penn Central*.

ARGUMENT

I

PENN CENTRAL DOES NOT ESTABLISH A RULE THAT TWO LEGALLY DISTINCT, BUT COMMONLY OWNED CONTIGUOUS PARCELS, MUST BE COMBINED FOR TAKINGS ANALYSIS PURPOSES

A. *Penn Central* Counsels Against Segmentation of Property Interests

The Wisconsin court below states a "rule" that contiguous parcels that happen to be owned by the same person shall be combined for purposes of considering whether regulatory action has resulted in a taking. The lower court proclaims that requiring such "aggregation" of adjacent parcels was established by the "parcel as a whole" ruling in *Penn Central*. But *Penn Central* was not an aggregation case. It did not involve combining two distinct parcels. Rather, *Penn Central* was a segmentation case. It involved a single parcel, the Grand Central Terminal, and the Court refused to segment the air rights from the parcel as a whole. The single parcel, *with all of its property interests that comprise the fee title*, including the air rights, was the relevant parcel to consider in evaluating the impact of the New York City regulations.

The same approach should be used in considering the taking of the Murrs' Lot E. They own fee title to Lot E, and they allege that this parcel as a whole has been taken. As will be shown, nothing in this Court's

decisions supports the notion that the taking of Lot E can be avoided by combining that lot with a separate, adjoining lot from which the Murrs already derive some economic use. Such a view rests on a superficial reading of *Penn Central* and significantly misinterprets the "parcel as a whole" concept.

In *Penn Central*, the company wanted to build an office tower in the air space above the historic Grand Central Terminal. The permit application was denied, prompting a takings claim of the right to develop the empty air space above the Terminal. The company's theory was that the air space itself was a valuable stick in the bundle of its property rights that comprised the Terminal parcel. Relying on *United States v. Causby*, 328 U.S. 256 (1946),[3] the company sought to segment the air rights from its bundle of rights, and claim that this particular interest had been taken. As framed by the Court:

> They [appellants] first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby*, supra. They urge that the

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[3] The company's theory in *Penn Central* to isolate the air rights was based on a fundamental misapplication of *Causby*. The taking in *Causby* was not of air rights, but was the parcel as a whole, *i.e.*, *the chicken ranch itself*. The flight of airplanes skimming the surface, but not touching it, completely destroyed the plaintiff's commercial chicken farm. This destruction of the farm was the key fact. *Causby*, 328 U.S. at 261. The taking in *Causby* was not based on segmenting the air rights, but was based on the magnitude of interference with the parcel as a whole. *Penn Central*, 438 U.S. at 135 ("Causby was a case of invasion of airspace that destroyed the use of the farm beneath"). The point is that neither *Causby* nor *Penn Central* allowed segmentation of the fee title into narrow property interests.

> Landmarks Law has deprived them of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superadjacent airspace, thus entitling them to "just compensation" measured by the value of these air rights.

Penn Central, 438 U.S. at 130.

This Court was not willing to segment the fee title of a single parcel into separate property interests.

> "Taking" jurisprudence does not divide a **single parcel** into discrete segments, and attempt to determine whether rights in a particular segment have been entirely abrogated.

438 U.S. at 130 (emphasis added). Rather than dividing a single parcel into segments, the Court explained that it focuses on interference with "rights in the parcel as a whole." *Id.*

In considering the whole parcel, rather than just the air rights, the Court explained that "the New York City law does not interfere in any way with the present uses of the Terminal." *Id.* at 136. Indeed, the company did not even contest that "the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return." *Id.* at 129 & n.26.

Penn Central's ruling is clear and limited. The plain language, quoted above, does nothing more than reject the company's attempt to divide a single parcel into separate strands of property interests, and then consider whether the particular strand has been taken.

The company's theory for segmenting its air rights from the rest of the Terminal parcel was rejected.

But the Court's rejection of the segmentation theory does not imply support for the very different theory that commonly owned parcels must be aggregated for takings analysis—the theory adopted by the Wisconsin court. Not surprisingly, the Wisconsin court provides no analysis of *Penn Central* to support its assertion of the rule. It simply refers to the phrase "parcel as a whole." But as used in *Penn Central*, this phrase expressly refers to the entire fee interest of the single parcel, the Grand Central Terminal.

Of course, the Murrs do not seek to segment their fee title as the property owner did in *Penn Central*. They ask that the entire Lot E be reviewed as the relevant unit of property.

B. The Wisconsin Rule Is an Extreme Approach That Is Contrary to *Penn Central*

When, as here, a property owner alleges a taking of an interest in a discrete and lawfully created parcel, there are two extremes for resolving the denominator question. First, one can propose segmenting the single parcel into narrow property interests (such as air rights) to find the relevant unit of property for takings analysis. If allowed, segmentation increases the likelihood of a taking because it is easier to show that a narrower unit of property has lost all economically beneficial use. The other extreme is to begin with the full title of the single parcel, but add other parcels to the equation (such as the Murrs' separate Lot F) prior to engaging in the takings inquiry. If allowed, aggregation decreases the likelihood of a taking

because the magnitude of the interference is measured against a larger property interest, thereby diluting the economic impact of the government action.

Penn Central rejected both extremes and opted for a middle ground under which a **single parcel** is neither segmented into narrow property interests, nor aggregated with other holdings.

It must be remembered that the New York Court of Appeals in *Penn Central* embraced an aggregative approach similar to that adopted by the Wisconsin court below. That is, the New York court considered the diminution in value of the Terminal in light of the total value of Penn Central's "heavy real estate holdings in the Grand Central area." *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333, 366 N.E.2d 1271, 1276 (1977).

It is clear that the railroad company owned numerous properties in the midtown Manhattan area, including properties adjacent to the Terminal. In 1969, the Landmarks Preservation Law was amended to allow transfers of development rights "from a landmark parcel to property across the street or across a street intersection." *Penn Central*, 438 U.S. at 114. These amendments were enacted specifically for the owners of the Grand Central Terminal. *Id.* Of course, the receiving parcels must be "in the same ownership" as the landmark parcel. *Id.* Significantly, among its holdings, there were at least eight parcels owned by Penn Central that were eligible to receive development rights because they were contiguous as being across the street or intersection from the Terminal. *Id.* at 115.

In considering whether there was a taking, the New York court stated that some of the income from the railroad company's common ownership parcels had to be "imputed to the Terminal." 42 N.Y.2d at 333. The New York court rationalized that the Terminal "acts, in effect, as a magnet for Penn Central's other, more profitable, enterprises." *Id.* at 334. The New York court summarized:

> In none of their analyses do they include the benefits provided to Penn Central's varied real estate holdings by the terminal's operation. These real, albeit indirect, benefits alone might suffice to provide Penn Central with a reasonable return.

Id. at 336.

This Court in *Penn Central* acknowledged the New York court's aggregative approach. 438 U.S. at 121-22. But it did not follow that reasoning. It refused to consider the company's other real estate holdings in the takings evaluation and instead focused the takings analysis on the single parcel, the Terminal itself. *Id.* at 130, 136-38.

In *Lucas*, this Court underscored its rejection of the New York court's aggregative approach. The Court stated:

> For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977), aff'd, 428 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), where the state court examined the diminution in a particular parcel's value

> produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.

Lucas, 505 U.S. at 1016 n.7.[4]

In summary, this Court has already rejected both of the extreme approaches for the denominator (segmentation and aggregation) when faced with a taking of a single parcel. The Court's takings jurisprudence prefers the middle ground, where takings tests are applied to the entire single parcel, nothing more, and nothing less.

There is accordingly no support in either the law or the facts of *Penn Central* for the Wisconsin court's conclusion that the Court established a rule that commonly owned contiguous parcels must be combined for consideration under the Takings Clause. The Wisconsin court's application of *Penn Central* is simply wrong.

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[4] In footnote 7, the Court provided an example of the circumstances where the relevant denominator remains uncertain. "When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 505 U.S. at 1016 n.7. This hypothetical differs from *Penn Central* because it does not involve the isolation of a particular strand of the fee title and, accordingly, remains an open question.

II

AS WITH *PENN CENTRAL*, SUBSEQUENT DECISIONS OF THIS COURT DO NOT SUPPORT WISCONSIN'S AGGREGATION RULE

Subsequent decisions reaffirm the moderate ruling of *Penn Central*, that a single parcel will neither be segmented into various strands, nor aggregated with other commonly owned parcels for takings analysis purposes. None of this Court's cases endorse anything like the Wisconsin rule.

For example, *Andrus v. Allard*, 444 U.S. 51 (1979), is consistent with *Penn Central* and does not extend its holding. There, federal statutes prohibited selling artifacts that contained bald eagle feathers. While the right to sell one's property is a significant strand in the bundle of rights, restrictions on that strand did not result in a taking of the artifact as a whole. *Id.* at 65-66 ("destruction of one 'strand' of the bundle is not a taking") (citing *Penn Central*, 438 U.S. at 130-31). In other words, the whole parcel in *Andrus* was the discrete item itself—the eagle feather artifact. The *Andrus* Court did not ask whether the claimant owned other artifacts which it had to combine to decide if a taking occurred.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987), is another example where the Court rejected an attempt to segment a parcel of property into narrow slices.[5] The claimants there

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[5] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), is not inconsistent with *Keystone Coal*. In *Kaiser Aetna*, the Court addressed a takings claim of "one of the most essential sticks in

(continued...)

"sought to narrowly define certain segments of their property" and assert a taking of that segment. 480 U.S. at 496. The coal company argued that the Subsidence Act "entirely destroys the value of their unique support estate." *Id.* at 500. But the Court found this strategy no different than the attempt to carve out the air rights in *Penn Central*. *Id.* at 500. The Court proceeded to explain that the support estate is always owned by either the owner of the surface estate, or the owner of the mineral estate. By itself, the support estate has no practical value.

> Thus, in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface.

Id. at 501. As with the continued profitable use of the Grand Central Terminal, so too the coal companies "retain the right to mine virtually all of the coal in their mineral estates" and "may continue to mine coal

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[5] (...continued)
the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 176. *Kaiser Aetna* is in the category of physical invasion cases, similar to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The government action in *Kaiser Aetna* was to "create a public right of access" (444 U.S. at 178), the result being an "actual physical invasion of the privately owned marina." *Id.* at 180; *see also Loretto*, 458 U.S. at 433 ("*Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character"). Accordingly, *Kaiser Aetna* is consistent with *Loretto*, and neither case undermines *Penn Central's* "parcel as a whole" rule in the non-physical invasion context.

profitably even if they may not destroy or damage surface structures at will in the process." *Id.*

Keystone Coal provides another example where the Court was not persuaded to divide property into narrow interests and find a taking of that interest where there remained extensive and profitable use of the subject property as a whole.

Perhaps the most significant case (post-*Penn Central*) is *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). But again, this decision does not extend, or retreat, from *Penn Central*.

In *Tahoe-Sierra*, petitioners argued to "sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria." 535 U.S. at 331. But such carving up of the fee simple estate into temporal segments was, yet again, too extreme. The Court responded:

> [D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and normal permit process alike would constitute categorical takings.

Id. The Court cited back to *Penn Central*, instructing again that the takings analysis must focus on the parcel as a whole, and not be carved into temporal segments. *Id.*

However, once again, the Court did not consider aggregating any discrete parcels in the takings analysis. In fact, it effectively rejected the idea,

elaborating on the "parcel as a whole" concept as follows:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole" . . . .

Tahoe-Sierra, 535 U.S. at 331-32. The "parcel as a whole" is defined in part by the geographic dimensions of the parcel. The *Penn Central* and *Tahoe-Sierra* Courts applied the same principle—that a single geographically defined parcel is to be considered as it is, neither sliced apart nor added to other parcels.

In summary, this Court's post-*Penn Central* jurisprudence is consistent with the principle established in *Penn Central*: that the *entire fee title of a single parcel* is the parcel as a whole—the relevant takings unit. Nothing endorses combining the fee title of a single parcel with the fee title of an adjoining single parcel.

Applying these rather unremarkable principles, the parcel as a whole for the Murrs is their entire Lot E. The parcel as a whole is not a geographic portion of Lot E, or a temporal slice of Lot E, or air rights, or riparian rights, or some other discrete interest that is part of the fee estate. Rather, it is Lot E, with all of the rights that comprise the fee title. In this case, that is the proper denominator in the takings equation

because that is the Murrs' parcel as a whole. *Penn Central*, 438 U.S. at 130; *Tahoe-Sierra*, 535 U.S. at 327, 331-32.

III

THIS COURT SHOULD CONFIRM THE PRESUMPTION THAT THE FEE TITLE TO EACH SINGLE PARCEL IS THE DENOMINATOR FOR THE TAKINGS ANALYSIS

A. The Presumption Provides Guidance and Consistency While Preserving Flexibility

Penn Central and *Tahoe-Sierra* have grounded the "parcel as a whole" concept in the single parcel. Those cases underscore that this Court looks to the single parcel as the relevant unit for measuring the extent of government interference. Accordingly, neither segmentation of the estate, nor aggregation of other parcels, should be the standard. Rather, measuring the extent of interference against the single parcel is the most reasonable position. Here, the Court should explicitly recognize and confirm that a distinct and geographically defined parcel of land is presumed to be the takings unit. Any party seeking to segment lesser interests or aggregate other parcels must prove that the facts warrant such unorthodox treatment.

The Murrs acknowledge that the facts of cases will vary, and that hard and fast rules can work an injustice. As Justice Ginsburg wrote for the Court in *Arkansas Game and Fish Commission v. United States*, __ U.S. __, 133 S. Ct. 511, 518 (2012):

> In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

The presumption is consistent with this concern of avoiding "invariable rules," while also providing a degree of predictability that is consistent with fundamental understandings of property law. Accordingly, a presumption strikes the appropriate balance, giving direction to lower courts while preserving the ability for landowners or government to argue, in the particular case, that the facts and circumstances warrant some degree of segmentation or aggregation.

For example, *Hodel v. Irving*, 481 U.S. 704 (1987), illustrates that even this Court's resistance to segmentation is not an ironclad rule. In that case, the Court determined that a taking may be found where there is complete abolition of the right to descent and devise of property. *Id.* at 716. "[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." *Id.*

Of course, a taking of the right to pass on property necessarily was a segmentation of a discrete interest that is otherwise part of the fee title. The *Hodel* decision therefore prompted Justice Scalia to remark "in finding a taking today our decision effectively limits *Allard* to its facts." *Id.* at 719 (Scalia, J., concurring). Not surprisingly, Justice Brennan also filed a concurrence stating that the particular circumstances of *Hodel* "make this case the unusual one." *Id.* at 718 (Brennan, J., concurring).

The apparent tension between *Hodel v. Irving* and *Andrus v. Allard* is resolved with the recognition that there will be circumstances where segmentation of a particular property interest yields the fair and just result. *Hodel v. Irving* is one of those cases. In other words, the particular facts in *Hodel* were sufficient to overcome the standard presumption that the fee interest will not be segmented. Similarly, in an appropriate case, the presumption not to aggregate separate parcels might be overcome. But the burden to show that either segmentation or aggregation of parcels applies, should be placed on the party making that assertion.

A presumption provides the flexibility required when fairness and justice demand a different result. In any takings case, fairness and justice must be the ultimate guide and objective.

> The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Arkansas Game and Fish, 133 S. Ct. at 518 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This principle is "fundamental in our Takings Clause jurisprudence." *Id.* By confirming the presumption, the ability is preserved for parties and courts to respond to unique facts that may demonstrate that the presumption should be overcome in the interest of fairness and justice.

B. Applying The Presumption In This Case Is Consistent with Traditional Understandings of Property Law

This is a case where a family purchased two separate pieces of property. Like the typical family, the Murrs certainly understood what they were buying in 1960 and 1963. They knew that they had purchased two separate residential parcels, and each was a separate fee interest. They knew that each parcel could be managed, conveyed, mortgaged, leased, or developed, independent of each other. Those are the *normal rights that any American family would understand they receive* when they buy a residential lot.

The reaction of Donna Murr and her family when they learned that the zoning restrictions prevented them from selling Lot E was that "we were quite flabbergasted." JA 93 (Donna Murr dep. at 21). Most Americans would probably react the same way. Why? Because people understand the basic unfairness of what happened to the Murrs. People rely on their title to property. People are making important decisions, and major investments, when they buy property. They necessarily rely on the rights that come with each separate parcel. Just as the Murrs' parents' purchase of Lot E was separate and independent of their prior purchase of Lot F, so should they be able to sell Lot E independently and separately from Lot F. This concept of fungible real estate is well ingrained in the mindset of American property owners.

Of course, this common understanding is well grounded in the law. An estate in fee simple is "an estate with a rich tradition of protection at common law." *Lucas*, 505 U.S. at 1016 n.7. Lot E became a

discrete and separate estate when its geographic boundaries were established in 1959, pursuant to a Certified Survey Map, as required under Wisconsin Statutes Section 236.34. This is consistent with the oft-quoted principle from *Board of Regents v. Roth*, 408 U.S. 564 (1972):

> [P]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that *secure certain benefits* and that *support claims of entitlement to those benefits.*

Id. at 577 (italics added).

Lot E was created pursuant to the laws and procedures of Wisconsin and, with that creation, certain benefits were secured to the Murrs. As owners of the fee title, they secured the right to possess, to exclude, to use the property, and to convey it to others. *United States v. General Motors*, 323 U.S. 373, 378 (1944). These ownership attributes were applicable to Lot E independent of whether or not the Murrs owned any other parcel.

The Murrs did not rely on a unilateral expectation that Lot E was independent of Lot F. They had a legitimate claim of entitlement to the separateness of Lot E because it was created and approved by government as an independent parcel. Once created as such, a purchaser is entitled to rely on that status.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Roth, 408 U.S. at 577. Of course, in addition to the purchaser, mortgage banks, and title companies, the entire real estate industry rely on the independence of separate fee titles.

Here, well established concepts of property law weigh heavily in favor of the Murrs. They had every reason to understand that Lot E was separate and distinct from Lot F. Their takings claim should be evaluated with the same understanding.

Confirming a presumption that each single parcel should be the denominator for takings analysis meets the expectations of typical people such as the Murrs. Such expectations are grounded in long established principles of property law and this Court's decisions in *Penn Central* and *Tahoe-Sierra*.

C. Fairness and Justice Further Support a Determination That the Murrs' Lot E Should Be the Relevant Parcel in This Case

Penn Central and *Tahoe-Sierra* provide the jurisprudential underpinning for the presumption. Its application here is also consistent with fairness and justice. In this case, there is no factual basis for overcoming the presumption and combining the Murrs' separate parcels into one.

Absent clarity from this Court, the United States Courts of Appeals have at times determined the relevant parcel on a case-by-case analysis of facts. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (two tracks were treated from the

outset as a "single integrated project"). But a factual review confirms that combining Lot F with Lot E for takings analysis is not warranted.

In *Palm Beach Isles*, the federal government argued that two parcels should be treated as one because they were purchased together in one transaction. 208 F.3d at 1380. The landowner countered that the two parcels were never planned to be developed as a single unit. *Id.* In contrast, the Murrs purchased Lot F and Lot E in completely distinct transactions. Those transactions were separated by three years.

Similarly, the Murrs never treated their two parcels as a single economic unit. Rather, the parcels were acquired at different times for very different purposes. Lot F was acquired to be the site of a family recreation cabin. It was developed by the Murrs for that purpose, and continues to be used for that purpose.

Completely independent from the cabin property, Lot E was purchased as an investment. It was held vacant, and the plan was to simply let the investment grow in value until some future time. The Murrs never applied for permits for a joint development or otherwise used or developed the properties in any fashion that would blur the property lines.

The facts here are simple. These are two separate and distinct parcels, and the history of the Murrs' purchase, use, and plans for the parcels do not warrant overriding the usual presumption of separateness to combine the parcels into one for purposes of the Takings Clause.

The Wisconsin court ignored these facts and relied on a single fact—the Murrs happen to own contiguous parcels. But reliance on that fact alone is arbitrary and discriminates against the Murrs.

In this case, the discriminatory impact of using contiguous common ownership as a determining fact is revealed by the operation of the grandfather clause. Grandfather clauses are mechanisms for achieving fairness to property owners, and they also benefit government. They allow government to enact new regulations to respond to changing circumstances without disrupting previously approved uses and sites.

But in St. Croix County, the fairness that is sought for other property owners by the grandfather clause is denied to the Murrs. Why? Because they happen to own the property next door. Lot E would be grandfathered as a separate building site for *any other owner*. For example, if the Murrs' parents had given Lot E to William Murr's best friend, the grandfather clause would protect Lot E as a pre-existing legal building site. But that same protection does not extend to the Murr siblings.

Anyone else in the world could own Lot E and use it as a buildable site. But the Murr siblings, as the owners of property next door, cannot. That is arbitrary.

At bottom, the facts of the Murrs purchase, use, and plans for Lot E are completely independent from Lot F. There is, therefore, no reason to depart from the presumption that the proper takings unit is the title to Lot E. Indeed, combining the lots for takings analysis purposes is not only unwarranted—it is discriminatory and undermines the basic concept of

fairness and justice that is the foundation of the Takings Clause. *Armstrong v. United States*, 364 U.S. at 49.

CONCLUSION

The Murrs are a typical family with normal understandings of real property. They purchased Lot E as an independent residential parcel, a separate fee estate. They allege that governmental interference with that parcel, depriving them of the separate right to independently sell or develop that parcel, amounts to a taking for which compensation should be paid. The Court is urged to hold that when evaluating a claim for the taking of a single parcel, *Penn Central* establishes a presumption that the relevant parcel to measure the degree of interference is the single parcel. In this case, there is no persuasive reason to overcome that presumption. Accordingly, the relevant parcel is Lot E.

DATED: April, 2016.

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In The

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF FOR RESPONDENT ST. CROIX COUNTY

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QUESTION PRESENTED

Petitioners own two adjacent lots of land that border a nationally designated wild and scenic river bisected by tree-lined bluffs. Each lot is "substandard" because neither lot alone meets a county zoning ordinance's minimum buildable acreage requirement for residential development due to flood risks and other topographical challenges. An exception that lifts that buildable acreage restriction on lots applies to commonly owned, adjacent lots only after the buildable acreage on the substandard lots is combined. As a result petitioners are permitted to build one residence on their two lots, but not a separate residence on each lot, and neither lot can be sold as a separately developable lot.

The question presented is whether a court, in reviewing a regulatory takings challenge to a county's application of its minimum buildable acreage requirement to two commonly owned, adjacent substandard lots, may assess the economic impact of the zoning requirement by comparing the value of the two lots with one residence to the value of the two lots with a residence on each lot.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioners Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver. The respondents are St. Croix County and the State of Wisconsin.

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No. 15-214

In The
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On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF FOR RESPONDENT ST. CROIX COUNTY

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The relevant statutory and regulatory provisions are reproduced in part in the appendix to the petition

(Pet. App. D1) and fully reproduced in the appendix to this brief (App., *infra*, C1-C28, D1-D4).[1]

STATEMENT

A. The St. Croix River: Geography And Historical Significance

1. Petitioners own 2.52 acres of land, originally platted in 1959, as two adjacent lots. The lots border the St. Croix River in St. Croix County, Wisconsin, and are nestled within the lower St. Croix River Valley. The Valley's lifeblood is the St. Croix River, named the

[1] This regulatory takings case represents a second round of litigation following an earlier round involving the state courts' rejection of petitioners' application for a variance. Although the Wisconsin Court of Appeals below relied significantly on that first round of litigation in their rulings on review here, the certified record in this case (and therefore the Joint Appendix) does not include many documents relevant to that first round of litigation. Because those documents seemed potentially helpful to the Court's review and are not otherwise readily available, they are included in an appendix to this brief, with the express acknowledgment that none is formally part of the certified record in this case and the Court may choose to discount them accordingly. The documents include the state court of appeals ruling in the initial round of litigation (App. A), the trial court ruling in the initial round of litigation (App. B), relevant excerpts from the County zoning ordinance in effect at the time of petitioners' application for a variance in 2006 (App. C), earlier versions of the County ordinance (App. D), an excerpt from petitioners' appellate brief in the initial litigation (App. E), and petitioners' original variance application with the County Board of Adjustment (App. F). Appendix G is the Wisconsin Circuit Court's denial of rehearing in this case, which is part of the record.

"*rivière de Ste. Croix*" in 1689 by the French commander Nicolas Perrot, a "picturesque waterway of 164 miles in length that flows steadily through eastern Minnesota and northwestern Wisconsin, eventually merging with the Mississippi River." *United States v. Bradac*, 910 F.2d 439, 440 (CA7 1990); *see* Harold Weatherhead, Westward to the St. Croix, vi (1978) (describing the history of "Naming the St. Croix").

Early settlers captured the beauty of the St. Croix River Valley in their writings. As described by one settler in 1803, "[n]ature is here calm, placid & serene, as if telling man, in language mute, indeed,—not addressed to the *Ears*, but to heart & Soul: It is here man is to be happy." Richard Bardon & Grace Lee Nute, *A Winter in the St. Croix Valley, 1802-03*, 28 Minnesota Hist. 225, 235 (Sept. 1947). Ray Stannard Baker, an American journalist, muckraker, and historian, grew up in the valley. In his memoir, he described how the river shaped his childhood: "[T]he geological interest of the St. Croix Valley * * * helped to lure me, as it lured many another boy of our town, to the exploration of the wild gorge through which the turbulent waters dropped in foaming rapids from the broad and placid river above the town to the rock-guarded Dalles below. Day or night, all my boyhood, the sound of roaring water was rarely absent from my ears." *See* Ray Stannard Baker, Native American: The Book of My Youth, 116 (1941).

Wisconsin and Minnesota have long faced the challenge of preserving the St. Croix River's great

beauty and essential navigability while promoting industry and economic development. For much of the nineteenth century, the St. Croix Valley was synonymous with forestry, particularly pine lumbering. *See* William G. Rector, *The Birth of the St. Croix Octopus*, 40 The Wisconsin Magazine of History, 171, 171-77 (1957). During the 1800s, wheat increasingly rivaled lumber as a St. Croix Valley export and competed for the River's use. In 1865, Horace Greeley boasted of the area, "the cry is Wheat! Wheat! * * * Every steamboat goes down the river with all the wheat on board that she will take, and a couple of wheat laden barges fast to her side." *See Wheat on the Upper Mississippi*, Sunbury American, Oct. 28, 1865, at 1.

2. After World War II, the river's aesthetic beauty and the area's proximity to Minneapolis-St. Paul led to rapid residential development in the towns bordering the St. Croix River. *See* Osh Andersen, et al., *Transformation of a Landscape in the Upper Mid-West, USA: The History of the Lower St. Croix River Valley, 1830 to Present*, 35 Landscape & Urban Planning 247, 264 (1996). A plan in the 1960s to build a coal-fired power plant along the St. Croix River galvanized a citizen campaign to preserve the St. Croix River and to protect the land bordering the river from accelerating and seemingly uncontrolled development. *See* Kate Hanson, *The Wild and Scenic St. Croix River*, 25 The George Wright Forum 27, 27-28 (Issue 2, 2008). In response to these specific concerns and similar concerns expressed about threats to other great rivers in the nation, Wisconsin Senator Gaylord Nelson championed

congressional passage of the Wild and Scenic Rivers Act in 1968, Pub. L. No. 90-542, 82 Stat. 906, which designated the Upper St. Croix River one of only eight rivers deserving immediate national protection "as components of the national wild and scenic rivers system" and placed under the control of the Secretary of the Interior. *Id.* § 3(a)(6), 82 Stat. 907-08; Hanson, *The Wild and Scenic St. Croix River*, *supra*, at 28. Soon thereafter, Minnesota Senator Walter Mondale joined Senator Nelson in persuading Congress to enact further legislation, the Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, 86 Stat. 1174, to include the Lower St. Croix River within the protections of the federal law. Hanson, *The Wild and Scenic St. Croix River*, *supra*, at 29.

The new law designated the upper 27-mile stretch of the Lower St. Croix River a federally administered scenic river and provided that the lower 25-mile stretch of river could immediately qualify for protection upon application of the Governors of Wisconsin and Minnesota and approval of the Secretary of the Interior. Pub. L. No. 92-560, § 2, 86 Stat. 1174. At the request of both States, the Secretary of the Interior approved the inclusion of the lowest portion of the St. Croix River as part of the National Wild and Scenic River System and confirmed that it would be "administered by the States of Minnesota and Wisconsin." Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26236, 26237 (1976).

B. State of Wisconsin And St. Croix County Land Use Planning For The Protection Of The Lower St. Croix Riverway

1. The Lower St. Croix River Act of 1972 required the Secretary of the Interior, along with Minnesota and Wisconsin agencies, to develop a "comprehensive master plan" to jointly manage the 52-mile tract of the Lower St. Croix Riverway. Pub. L. No. 92-560, § 3, 86 Stat. 1174. Accordingly, in 1975, the National Park Service, Wisconsin Department of Natural Resources, and Minnesota Department of Natural Resources published their first "Master Plan" for the Lower St. Croix River. Nat'l Park Serv., Minn. Dep't of Nat. Res. & Wis. Dep't of Nat. Res., Master Plan: Lower St. Croix National Scenic Riverway (1975) (reproduced at 40 Fed. Reg. 43240, 43240-58 (1975)).

The State of Wisconsin enacted its legislation implementing the 1972 federal legislation in 1973. *See* St. Croix River Preservation, 1973 Assemb. B. 1242, ch. 197, Wis. Stat. § 30.27 (1973). This statute authorized the Wisconsin Department of Natural Resources to promulgate regulations, including standards for the "issuance of building permits" and the "establishment of acreage, frontage and setback requirements" for the "banks, bluff, and bluff tops" of the river. Wis. Stat. § 30.27(2). Section 30.27 further mandated that all counties within the riverway adopt zoning ordinances that comply with these standards. *Id.* § 30.27(3). To that end, the Wisconsin Department of Natural Resources in 1975 created a set of rules—Chapter NR 118—which established baseline standards for local

zoning ordinances, including minimum buildable acreage requirements; exemptions from those requirements for certain types of pre-existing lots; and variances based on an applicant's showing of unnecessary hardship. The new rules became effective on January 1, 1976. Wis. Admin. Code § NR 118 (1976).

2. In response to NR 118, St. Croix County amended its zoning ordinance to include a "Lower St. Croix Riverway Overlay District," which mirrors all the detailed requirements for local ordinances set forth in NR 118. *See* Cty. Zoning Ord. § 17.36 (App., *infra*, C5-C22). The County has continued to update its zoning ordinance to reflect subsequent changes by the Wisconsin Department of Natural Resources in NR 118.[2] The County zoning ordinance sets forth its general and specific purposes. They include, but are not limited to "[r]educing the adverse effects of overcrowding and poorly planned shoreline and bluff area development"; "[p]reventing soil erosion and pollution and contamination of surface water and groundwater"; "[p]roviding sufficient space on lots for sanitary facilities"; and "[m]inimizing flood damage." Cty. Zoning Ord. § 17.36.B.1.a. The primary listed purposes

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[2] Unless otherwise expressly noted, references in this brief to the St. Croix County zoning ordinance refer to the ordinance as it existed at the time of petitioners' 2006 application for a variance at issue in this case. *See* note 1, *supra*; App. C, *infra*. Although the relevant substance of the ordinance for the purposes of this case has remained largely the same since, its structure and its section numbering have changed significantly in several parts.

also include "maintaining property values." *Id.* § 17.36.B.1.a.5.

As required by NR 118, the St. Croix County zoning ordinance requires that a lot contain at least one acre of "net project area" to be a "building site." *See id.* § 17.36.G.1.b. "Net project area" is in turn defined to exclude land that is not suitable for building, including "slope preservation zones, floodplains, road rights-of-way and wetlands." *Id.* § 17.09.135. The County zoning ordinance also tracks NR 118 by including an exception for lots pre-dating NR 118's effective date. The exception sets forth specific conditions that must be met for a landowner to be allowed to build or sell a substandard lot:

> Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> 1) The lot is in separate ownership from abutting lands, or 2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots*

> *if each of the lots has at least one acre of net project area.*[3]

Id. § 17.36.I.4.a (emphasis added); *see* Wis. Admin. Code § NR 118.08(4). The County ordinance, accordingly, distinguishes between owners of pre-existing substandard lots who also own adjacent, substandard lots and those who do not. The former are eligible for an exception from the minimum buildable acreage requirement only after the buildable acreage available on each of the adjacent lots is combined.[4]

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[3] The original 1975 version of the St. Croix County Zoning Ordinance for the St. Croix Riverway, like the version of NR 118 then in effect, included the same limitation on providing pre-existing substandard lots with a special exemption from the minimum building acreage requirement: the exemption was available "provided that lands abutting the parcel in question are not under ownership or control of the applicant * * *." St. Croix Cty. Zoning Ord., St. Croix River Valley Dist., § 3.10.8 (1975), App., *infra*, D1. But neither originally included the further explicit statement, added in July 2005 to the County ordinance and in 2004 to NR 118, that "[a]djacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area." Cty. Zoning Ord. § 17.36.I.4; Wis. Admin. Code § NR 118.08(4). It is not disputed that the County in practice applied the same restriction on separate sale and development prior to the 2005 amendment, based on its interpretation of the earlier language. Petitioners have never raised any claim in either round of litigation related to the 2005 change in language.

[4] The language of the County zoning ordinance, like the identical language of NR 118, could be read to mean that an owner of two adjacent substandard lots that in combination still lack the one acre of buildable acreage could not construct one building on the two sites but an owner of one substandard lot with less than one acre could. Characterizing such a reading as "seemingly absurd" (App., *infra*, A8 n.9), the state court of appeals in the earlier

Finally, the County zoning ordinance also allows for variances based on a landowner's showing of "unnecessary hardship." Cty. Zoning Ord. §§ 17.36.J.2, 17.70(5)(c)(3). To establish "unnecessary hardship," the applicant for a variance must demonstrate to the County's Board of Adjustment that "special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions * * * unnecessarily burdensome or unreasonable in light of the purposes of this ordinance. Cty. Zoning Ord. § 17.09.232.

C. The Denial Of Petitioners' Request For A Variance From The Minimum Buildable Acreage Requirement

1. Petitioners own 2.52 acres of beachfront land bordering the Lower St. Croix River, which they received as a gift from their parents through two conveyances in 1994 and 1995. Pet. App. A3, B1. Petitioners' parents purchased the property in the early 1960s as two separate lots, both recorded in 1959. J.A. 82. The St. Croix River runs across the northern border of both

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litigation in this case assumed the validity of the contrary view, advanced by the County, that the exception would be available to the owner of the two adjacent substandard lots, allowing the construction of a building on either lot, or straddling both lots even though the combined acreage of the two lots together still fell below the one acre minimum threshold. *See* note 10, *infra*. It is now common ground in this litigation that "[t]here is no dispute that [petitioners'] property suffices as a single, buildable lot under the Ordinance." Pet. App. A12.

lots; each is roughly rectangular in shape, sits perpendicular to the river, and is bisected by an exceedingly steep slope leading to a bluff. *See* J.A. 60 (aerial photograph of both lots). For the purpose of this litigation, the parties and the courts below refer to the eastern lot as "Lot F," which is 1.25 acres, and the western lot as "Lot E," which is 1.27 acres. J.A. 29-30. *See* Pet. App. A2 n.1.

Soon after purchasing Lot F in 1960, petitioners' parents transferred ownership of the lot to Murr Plumbing Company, which they owned. They also built a small summer recreational cabin on the lot less than 100 feet from the river's ordinary high water mark. Pet. App. A3; App., *infra*, B2. In 1963, the parents purchased Lot E. Pet. App. A3. And, in 1982, Murr Plumbing Company conveyed Lot F back to the Murr parents. Lots E and F, accordingly, were first in common ownership in 1982.[5]

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[5] The state courts below mistakenly assumed (Pet. App. A3, A17, B2, B7) that the two lots did not come under common ownership until 1995: that is, after the Murr parents conveyed Lot E to petitioners, having previously conveyed Lot F to petitioners in 1994. The courts' mistaken assumption appears to derive from the omission from petitioners' complaint of the 1982 transfer of Lot E from Murr Plumbing Company back to petitioners' parents. The complaint refers to the 1960 transfer to the plumbing company and neglects to mention the 1982 reconveyance. *See* J.A. 6 (Complaint ¶ 11). In its briefing before this Court, petitioners continue to perpetuate that error by claiming that "[i]n 1994, the [Murr] parents transferred title to Lot F (the cabin parcel) from the plumbing company to their six children" (Pet. Br. 4), and by making legal arguments based on that factual assertion (*id.* at 31).

2. The property's terrain presents a challenging site for development. The petitioners' lots are bisected by a very steep, nontraversable slope, running east-west and leading to a 130-foot tall bluff. App., *infra*, B2; *see* J.A. 60 (aerial photograph). There is some moderately level land both above and below the bluff, but the land at the bottom is sharply constrained for development by the river to the north and the bluff to the south, which is why many other riverway property owners have located their houses at the top of the bluff. Because, moreover, the land's northern border extends to the river's ordinary high water mark, much of that

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Petitioners' arguments directly contradict their express acknowledgment of the 1982 reconveyance in the initial round of litigation before the state court of appeals: "For the sake of full disclosure [Lot F] was transferred from William Murr Plumbing, Inc. back to William and Margaret Murr in 1982. That transfer was not detailed at the board of adjustment hearing, and appellants share this information out of candor to the court." *See* App., *infra*, E3 n.1 (quoting Brief of Petitioner-Appellant-Cross Respondent Donna J. Murr). The County has since confirmed the accuracy of petitioners' disclosure based on the County's independent examination of the records maintained by the County Register of Deeds. That the lots came under common ownership in 1982 rather than in 1995 means that the Murr parents could not, consistent with the County zoning ordinance restrictions on commonly owned, adjacent substandard lots, have conveyed Lots E and F to separate persons in 1994 and 1995. The state court of appeals below, unaware of this fact, assumed the contrary (Pet. App. A17), but the validity of its judgment does not turn on the correctness of that assumption. Should the Court reject our position that affirmance is warranted based on the existing record and remand to the state courts for any reason, those courts will be free then to consider the legal relevance of the 1982 transfer in the first instance.

land below the bluff lies within the St. Croix River's floodplain. *Id.*; J.A. 29-31.

3. Petitioners and their parents have used and enjoyed the two lots in combination since becoming owners. They have used the lot adjacent to the cabin for swimming, camping, and parking. They also created a volleyball court there. Neither they nor the parents ever treated them as distinct parcels in their day-to-day use of the lots.[6]

In 2004, petitioners contacted the County about possibly floodproofing or otherwise modifying their summer recreational cabin. J.A. 76. The cabin constitutes a nonconforming structure because it was built before current development restrictions were in place and it does not meet their standards, including the required 200-foot setback from the ordinary high water mark. *See* Cty. Zoning Ord. § 17.36.G.5.c.1. Because the cabin is located in a floodplain, it has been repeatedly and significantly damaged by floods over the years. Pet. App. A4; J.A. 100-02.

The Petitioners were reportedly "flabbergasted" (J.A. 93) to learn that because of restrictions on residential development on land bordering the St. Croix River—that had been in place since 1975—they were limited in their ability to modify their existing cabin

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[6] *See* Deposition of Joseph Murr, 47-48 (reproduced at Cert. Rec. Docket No. 18, pp. 69-70); Deposition of Peggy Murr Heaver, 9 (reproduced at Cert. Rec. Docket No. 18, p. 75). It is accordingly inaccurate for petitioners to assert that they "never treated their two parcels as a single economic unit." Pet. Br. 29.

and otherwise to construct new developments on Lots E and F. Although petitioners retain options to floodproof and improve their existing cabin under the zoning restrictions, they can do so without obtaining a variance only so long as they remain within the cabin's current footprint, limit improvements to less than 50 percent of the existing home, and floodproof in particular ways. They cannot, however, significantly expand the cabin's footprint or move the cabin within Lot F absent a variance. *See* J.A. 68; Cty. Zoning Ord. §§ 17.36.I.2.c, 17.40.G.3, 17.40.H.1.b.5-6, 17.40.H.3.a. In addition, because each lot lacks the one acre of buildable acreage required by the County zoning ordinance since 1975, petitioners require a variance to build a house on each lot or to sell either lot separately as a developable lot. *See* Cty. Zoning Ord. § 17.36.G.1.b.

4. In 2006, petitioners applied to the County for a variance from the minimum buildable acreage requirement. J.A. 61-62.[7] Although formally labeled an application for a "[v]ariance" to use both lots as "separate building sites" (J.A. 62), petitioners acknowledged that their application would "be better characterized as an appeal of the zoning office's interpretation" that

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[7] When petitioners first applied in February 2006, their application included a request to "redraw the lot lines," merging portions of Lots E and F into two new lots: one lot below the bluff and a second lot above the bluff. *See* App., *infra*, F34. But they subsequently amended the application in May 2006 by eliminating this proposal in favor of using the two lots "as separate building sites." J.A. 62 (Item #1).

their property was subject to the minimum buildable acreage requirement. *See* App., *infra*, E2.[8]

5. The County Board of Adjustment denied petitioners' application, rejecting their argument that their two lots should not be considered commonly owned for the purposes of applying the minimum buildable acreage requirement. J.A. 61-73. The Board further concluded that denying the variance would not constitute "unnecessary hardship" entitling petitioners to a variance "because it would not deprive the[m] of reasonable use of their property since their contiguous substandard lots can be developed and sold jointly as a single, more conforming parcel that is more suitable for residential development." *Id.* at 65.

The Board also detailed the significant harm that would result from granting the variance. *Id.* at 66. By allowing an additional residence that failed to meet minimum standards in an area already threatened by overcrowded development, the Board stressed, the County's ability to prevent harmful soil erosion, avoid contamination of surface and ground water, minimize flood damage, and maintain property values would be seriously undermined. The adverse effects of lifting a prohibition on construction would also be effectively permanent and ongoing. *Id.*

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[8] Petitioners also sought five other variances and two exceptions from other restrictions—triggered primarily by the substantial floodplain and exceedingly steep slope on their land—that limited their ability to build a new, larger home on Lot F outside the current footprint of the existing cabin. J.A. 62-63.

6. Petitioners filed a lawsuit challenging the Board's interpretation of the applicability of the minimum buildable acreage requirement to Lots E and F, and both the state trial court and the state court of appeals upheld the Board. App., *infra*, B1-B7 (trial court ruling), A1-A15 (appellate court ruling). The appellate court concluded that the ordinance applies to all commonly owned, adjacent substandard properties, "regardless of when they come under common ownership." *Id.* at A2.[9] The court further agreed with the County that petitioners could build a new home on their pre-existing two lots based on the lots' combined net project area, which was still below the one-acre minimum buildable acreage requirement. *Id.* at A8 n.9.[10]

Finally, the appellate court defended the reasonableness of the exception's distinction based on whether the owner of a substandard lot also owned an adjacent substandard lot. The court explained that its

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[9] The trial court reversed the Board's denial of the other variances and exceptions related to reconstruction of petitioners' existing home on Lot F. App., *infra*, B4-B6; *see* note 8, *supra*. The court of appeals subsequently reversed the trial court's ruling on those additional issues (App., *infra*, A12-A15), which are not at issue before this Court.

[10] "[S]ignificant to [the court's] interpretation of the [ordinance's] manifest intent" was its "assumption" of the correctness of the County's view that the ordinance should not be read to provide that a person could build if she owned only one pre-existing substandard lot with less than one buildable acre, but could not build if she owned two contiguous, pre-existing substandard lots with less than one buildable acre. *See* App., *infra*, A8 n.9; note 5, *supra*.

interpretation was "consistent with the manifest intent of the ordinance and [NR 118] to preserve property values while limiting environmental impacts." App., *infra*, A9. As described by the court, the exemption for substandard lots sought to ensure that "[w]hen the provision became effective, every person who already owned a lot could still build." *Id.* at A10.

For those who owned only a single lot that "was too small [to build] under the new rule," it "was acceptable" to make an exception so they "could still build on their lot or sell it as a developable lot" because otherwise their property value might be completely destroyed. *Id.* But where, as in this case, "the substandard lot owner owned an adjacent lot as well, then the lots were *effectively merged* and the owner could only sell or build on the single larger lot." *Id.* (emphasis supplied). Unlike the owners of a single isolated substandard lot, the owners of adjacent substandard lots, like petitioners, did not require a blanket exemption to avoid the possibility of having their property values completely destroyed. *See id.* Providing them instead with a more limited exemption better "preserved both property values and the environment." *Id.*

D. Petitioners' Regulatory Takings Claim

1. Following the state courts' rejection of their claim that the minimum buildable acreage requirement did not apply to their land, petitioners filed this regulatory takings challenge in state court. J.A. 4-10. They contended that the County's denial of petitioners'

ability to develop or sell Lot E separately from Lot F amounted to an unconstitutional taking of Lot E absent the payment of just compensation. *See id.* at 9-10 (Complaint ¶¶ 34-42).

2. The trial court granted the County's motion for summary judgment. Pet. App. B1-B10.[11] The court found that there was no genuine issue of material fact that petitioners retained "use and enjoyment of their property despite the denial of the variance." *Id.* at B9. They had options to reconstruct and floodproof the existing cabin within its current footprint or, if petitioners preferred the new, larger house contemplated by their application, to replace the cabin with such a house on top of the bluff located on either lot or straddling the two lots. *Id.* The court further noted that "the market value of the property has not been significantly impacted by the denial of the variance to separately sell or develop the lots." *Id.* The difference between the market value of the larger lot with one home and the

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[11] The trial court also granted the County's motion on the additional, independent ground that petitioners' takings claim was time-barred as a matter of state law. *See* Pet. App. B6-B7. The state court of appeals affirmed the trial court's summary judgment ruling without reaching the statute of limitations issue (*see id.* at A7). That potentially independent and adequate state law ground in support of the judgment is accordingly not before this Court but would be available for the state court of appeals' consideration, along with a ripeness defense the County raised but the appellate court did not reach, should this Court decline to affirm and remand the case to the state courts.

two lots each with their own home was less than ten percent: $698,000 instead of $771,000. *Id.*[12]

3. The state court of appeals affirmed. Pet. App. A1-A18. The appellate court "agree[d] with the circuit court that the challenged regulatory action, an ordinance that effectively merged the Murrs' two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property." *Id.* at A1-A2. The state court of appeals also agreed with the trial court that petitioners could "continue to use their property for residential purposes," including the option of replacing their existing summer cabin with a new, year-round residence "entirely on Lot E, entirely on Lot F, or it could straddle both lots." *Id.* at A12-A13. In concluding that there was no "genuine issue of material fact" that the "property decreased in value by less than ten percent" (*id.* at

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[12] The trial court relied (Pet. App. B9) on the County's expert who explained in detail why the reduction in value was relatively small. *See* J.A. 15-60 (property appraisal by Scott R. Williams). While Lot E has about 100 feet of waterfront, Lot F has only 58 feet (*id.* at 32-33), which is less attractive to purchasers of higher end homes in the area. However, the combination of 2.5 acres and 158 feet of riverfront, provided by the ordinance's merger of the two lots, would allow for the construction of the larger, more elaborate, and expensive residence that is popular along the riverfront. *Id.* at 47-59; Affidavit of Scott Williams, 41 (Cert. Rec. Docket No. 17, p. 17-49) ("[T]here is no question that most buyers would prefer to have wider lots with more frontage * * * , more privacy, more elbow room, and higher prestige."). The trial court also found petitioners' expert failed to raise a genuine issue of material fact regarding reduction in value because the testimony failed to consider the value of both lots together and because it was not based on "information as to the effect on fair market value." *See* App., *infra*, G3-G4.

A15-A16), the court of appeals relied on both the Wisconsin Supreme Court's opinion in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), and the fact that the County zoning ordinance had "effectively merged" petitioners' two commonly owned, substandard adjacent lots. Pet. App. A1, A3, A17.

SUMMARY OF ARGUMENT

The state court of appeals correctly considered the value of petitioners' land with one residence on petitioners' two adjacent substandard lots in comparison to the value of the land with one residence on each lot in ruling on summary judgment that the County's application of its minimum buildable acreage requirements to petitioners' property did not constitute a regulatory taking. Petitioners contend that the court below erred because it should instead have measured the value of the lot that they allege was taken based on its sale or development potential on its own, without considering its sale or development potential when combined with the adjacent, substandard lot that petitioners also own. But this Court's precedent provides no support for such a fictional measure of economic impact, which would ignore the true economic value of petitioner's property under the clear terms of the County zoning ordinance and the particular facts of this case. Petitioners' contrary argument is riddled with error.

1. First, "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010). Petitioners, however, pay only lip service to the central role that state law plays under this Court's precedent in defining in the first instance the scope of the property interest that has allegedly been taken by a regulation.

In particular, petitioners propose that lot lines established by state law presumptively define the geographic boundaries of the property for the purpose of evaluating the economic impact of a governmental restriction on that property's use, while ignoring other state laws that authoritatively make clear that state lot lines lack such legal significance. Indeed, in earlier litigation involving these same parties, the Wisconsin courts held that petitioners' two substandard, adjacent lots had been "effectively merged" for the purpose of compliance with the very zoning restriction petitioners challenge as a taking. Petitioners' reliance on the lines dividing their two lots is therefore entirely misplaced. They create no presumptive definition of the scope of property for takings purposes and, even if they did, any such presumption would be easily overcome in this case by other state laws that squarely deny the presumption's legitimacy in Wisconsin.

2. Wisconsin law, as reflected both in the County zoning ordinance and NR 118, is also consistent with how States and local governments nationwide have

long treated commonly owned, adjacent substandard lots. For almost a century, state statutes and regulations and municipal zoning ordinances across the country have drawn precisely the same distinction. They have conditioned the availability of an exemption from minimum acreage requirements to commonly owned, adjacent substandard lots on combining the acreage on the adjacent lots to meet or at least more closely approximate those requirements.

Indeed, the distinct treatment of commonly owned, adjacent substandard lots is so longstanding and widespread as to be fairly considered part of what Justice Kennedy has described as "the whole of our legal tradition" upon which "reasonable expectations must be understood" in defining property rights in land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). Petitioners, accordingly, cannot persuasively maintain that the ordinance's restrictions on their separate sale of Lot E as a developable parcel either amounted to an unfair surprise or interfered with the reasonable expectations that define their property rights. No doubt that is also why no court has ever held during the approximately one hundred years that such laws effectively merging adjacent substandard lots have been around that they amounted to an unconstitutional taking.

3. Petitioners also misread *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), as well as this Court's subsequent rulings, in claiming that the state court of appeals below ran afoul of this Court's precedent in deciding that petitioners had

failed to make a sufficient showing of adverse economic impact to survive the County's motion for summary judgment. The state appellate court's consideration of the undisputed evidence of the value of Lot E in relation to Lot F is entirely consistent with *Penn Central* and every other instance in which the Court has similarly made clear that a court should consider the economic impact of the "parcel as a whole" in evaluating a regulatory takings claim. *Id.* at 130-31. A fair reading of the Court's case law provides no support for petitioners' suggestion that this case can be fairly distinguished from that controlling precedent on the ground that this case involves an "aggregation" of distinct lots and the Court's cases all involved rejections of landowners' efforts to "segment" distinct lots. The Court's rationale cannot be so cabined.

Lot lines are no more controlling for defining the "parcel as a whole" inquiry than a host of other bases that this Court has previously rejected in regulatory takings cases for dividing commonly owned property rights up into smaller parts. In regulatory takings cases, lot lines are among the generally relevant factors to be considered along with several case-specific factors, including but not limited to contiguousness, ownership history, and unity of use, in deciding how the Takings Clause's concerns with "fairness and justice" warrant defining the parcel in a particular case. But, where, as here, applicable state law directly contradicts the relevance of state lot lines that petitioners nonetheless posit, in no event may they be deemed to

answer the question how the "parcel as a whole" must be defined.

4. Finally, the "parcel as a whole" theory in application to the unusual circumstances of this case might best be viewed as a red herring because it does not resolve petitioners' takings claim. Regardless of how one defines the parcel, whether Lots E and F are separate or combined, petitioners' takings claim is equally without merit. No matter how one draws the lines, sufficient valuable use of petitioners' land remains to warrant dismissal of petitioners' complaint on summary judgment.

Lot E's market value depends on what uses are in fact allowed of Lot E under the terms of the County zoning ordinance, and those allowable uses do not depend upon how a reviewing court chooses to define the "parcel" in a takings case challenging that ordinance. Here, the state courts concluded there was no genuine issue of material fact to support petitioners' allegation that the ordinance reduced significantly the value of Lot E. The state courts found the difference between the market value of the two lots combined, with one residence, was only ten percent less than if there were a residence on both lots and they could be separately sold.

It was that finding that prompted both courts to conclude that summary judgment dismissing petitioners' takings complaint was warranted. Because that same deficiency persists under either of the competing

theories for defining petitioners' property, the judgment of the state courts can be affirmed without even addressing the question presented.

ARGUMENT

THE STATE COURT OF APPEALS CORRECTLY COMPARED THE VALUE OF PETITIONERS' TWO ADJACENT LOTS WITH ONE RESIDENCE TO THE VALUE OF THE TWO LOTS WITH ONE RESIDENCE ON EACH LOT IN RULING THAT THE COUNTY'S APPLICATION OF ITS MINIMUM BUILDABLE ACREAGE REQUIREMENT TO PETITIONERS' PROPERTY DID NOT CONSTITUTE A REGULATORY TAKING

Petitioners ask this Court to "examine the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *see* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) ("The difficulty is aggravated when the question is raised of how to define the 'particular thing' whose value is to furnish the denominator of the fraction."). Nominally embracing this Court's ruling in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that the extent of deprivation effected by a regulatory action should be measured against the value of "the parcel as a whole" (*id.* at 130-31), petitioners invite this Court to rule that

the physical boundaries of that "whole parcel" should be presumptively defined by lot lines established under state law. *See* Pet. Br. 24-26. The Court should decline the invitation.

Petitioners' view of federal regulatory takings law finds no support in either state law or this Court's takings precedent. It intrudes upon, rather than promotes, a State's recognized authority to define private property rights in land by exaggerating the significance of one aspect of state law—lot lines—and by ignoring state property law "as a whole." It rests on a reading of the Court's opinions that cannot be squared with the actual rulings in those cases. And it is contradicted by the undisputed facts of this case, which make clear that regardless of how one defines petitioners' property, petitioners have not suffered an economic burden sufficient to sustain their takings claim. The judgment of the state court of appeals below should be affirmed.

A. The Judgment Below Rests On Longstanding, Generally Applicable State Law Governing Commonly Owned, Substandard Adjacent Lots And Not On A Per Se Rule Of Federal Constitutional Law

Much of petitioners' brief is misdirected. It faults the state courts below for relying on an interpretation of federal constitutional law that, according to petitioners, fails to give sufficient deference to state law. Petitioners, however, have it backwards. The state court judgment under review does *not* rest on a sweeping

principle of federal constitutional law mandating that, notwithstanding any state law to the contrary, courts in takings cases must always combine contiguous land in evaluating whether a land-use restriction on any part of that land amounts to a regulatory taking. Instead, it is petitioners' own arguments that rest on the proposition that federal constitutional takings law overrides state property law. Petitioners single out one isolated part of state law—that creating lot lines—as presumptively overriding other parts of state property law that limit the legal significance of those same lot lines. This Court's precedent, however, makes plain that proper respect for state property law requires consideration of all and not some state law in defining the scope of property rights in regulatory takings cases, along with a host of other case-specific factors.

1. The extent to which property is protected by the Takings Clause is of course ultimately a question of federal constitutional law, but "property interests * * * are not created by the Constitution." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Nor are property interests created by a landowner's unilateral, subjective expectations concerning what the landowner would prefer to do with the land. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* For that same reason, even a regulation that deprives a landowner of all economically viable use of her property is not a taking when the regulation expresses "the restrictions that background principles of the State's

law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

Where, as in this case, what is at issue are private property rights in land and the significance of lot lines established under state law, a court may accordingly look to "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* at 1017 n.7. The relevant state law includes the law of Wisconsin that established petitioners' lot lines, but also includes Wisconsin's "background principles" of property law. "The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010).

2. Looking therefore to "property rights as they are established" in Wisconsin (*id.*), there is plainly no merit to petitioners' contention that the lines defining Lot E presumptively define the exclusive geographic scope of petitioners' property in evaluating their takings claim. The Wisconsin law that established the lot lines dividing Lot E from Lot F cannot support the great weight that petitioners would place upon those lines. And their argument quickly crumbles.

The lot lines were initially drawn in 1959, a year before petitioners' parents purchased the first lot (Lot F). *See* J.A. 84-85. There was nothing inherently permanent or otherwise immutable about those initial lot lines, which are subject to subsequent change in multiple ways. For example, under Wisconsin law, courts can alter lots (Wis. Stat. § 236.45(2)(am)(1) (2015-2016)); new roads can modify lots (66 Wis. Op. Att'y Gen. 2, 7 (1977)); and adverse possession can add and subtract from lots (Wis. Stat. § 893.24 (2015-2016)). Even more tellingly, abutting landowners in Wisconsin routinely redraw lot lines by selling portions of their land to each other, without any government oversight. *See, e.g.*, Wis. Stat. § 236.45(2)(am)(3). Indeed, the maps in the record of this case show that Lot F's lines are dramatically different today from what they were when first drawn in 1959. There have clearly been significant subsequent subtractions and additions. For example, in 1964, petitioners' parents added to Lot F by purchasing an additional boathouse lot. *See* J.A. 117. A comparison of survey maps in the record shows that Lot F today is approximately half its original size. *Compare* J.A. 85, *with id.* 22, 28, 60. Indeed, contrary to their current statement that they never contemplated action "that would blur the property lines" (Pet. Br. 30), petitioners themselves initially sought to redraw the lot lines for both Lots E and F (App., *infra*, F1, F3-F4, F34), and their parents had previously contemplated doing the same (J.A. 89-92). *See* note 7, *supra*.

Even more fundamentally, the government's initial creation of lot lines does not reflect a formal governmental determination (let alone a guarantee) regarding the suitability of those lots for a particular kind or amount of residential development. That more formal determination of suitability for residential development instead occurred for petitioners' lots (and all lot owners along the riverway) in 1975, after a rigorous assessment of the very significant physical challenges for residential development presented by the geology of the lands located along the St. Croix River in both Wisconsin and Minnesota. *See* pp. 6-10, *supra*. That comprehensive assessment in turn led to the adoption of state law, in the form of the St. Croix County zoning ordinance in compliance with NR 118, which both restricted development based on minimum buildable acreage requirements and created an exception for certain types of pre-existing lots that failed to meet the new standards.

The judgment of state and municipal lawmakers was that where, as in this case, there are two adjacent substandard lots under common ownership, those lots should be effectively merged for the purposes of meeting the minimum buildable acreage requirement before any exemption to that requirement could be applied. Cty. Zoning Ord. §§ 17.36.G.1, 17.36.I.4. The justification for the distinction between commonly owned, adjacent substandard lots and single, isolated substandard lots is straightforward. Those who own adjacent substandard lots are less in need of an

automatic exemption from the minimum acreage requirement to avoid hardship. Unlike owners of isolated lots who, absent a complete exemption, will have no ability to develop their property, the owners of adjacent lots can take advantage of their combined acreage to more fully satisfy the acreage requirement.

Petitioners' own circumstances are illustrative. They do not need the benefit of the complete exemption from the minimum buildable acreage requirement to be able to make economically valuable use of their land. Under the terms of the County's zoning ordinance, it is undisputed that petitioners are allowed to build one residence on their two lots, which allows their property to retain significant economic value. Petitioners, moreover, are allowed to build that residence even though the amount of buildable acreage on their two lots combined (.98 acres) still falls short of the one-acre minimum. Petitioners, therefore, are still benefiting from a partial lifting of the County zoning ordinance's minimum buildable acreage requirement.

The palpable reduction in hardship to the owner of adjacent substandard lots also underscores why, contrary to petitioners' contention (Pet. Br. 7, 31), the County zoning ordinance's distinctive treatment of such landowners is both fair and just. Any lifting of a development restriction on a substandard lot has a substantial cost. The exception permits a permanent residence to be built in a location that the land-use planners and local officials have otherwise deemed physically unsuitable for such a residence, which necessarily undercuts the State's and County's ability to

prevent harmful soil erosion, surface and ground water contamination, and flood damage in a treasured riverway. There is nothing temporary or transitional about those very real costs.

No less weighty is the legal import of the County zoning ordinance's treatment of commonly owned, adjacent substandard lots for the lot line dividing Lots E and F. As aptly described by the state appellate court below and in the earlier litigation, Lots E and F are "effectively merged" as a matter of state law. Pet. App. A1; App., *infra*, A10. State law therefore already determined the legal relevance of lot lines for the purposes of state property law.

Petitioners cannot pick and choose among relevant state laws that define the scope of their property rights. Yet, that is in effect what they propose here. The state laws they view as friendly to their argument, they contend, create a presumption as a matter of federal constitutional law. And those state laws that contradict their view are relegated, under their analysis, to a secondary status. But, of course, that is not how state property law works in defining private property rights in land under this Court's takings precedent. One must look to the whole of state property law, akin to how this Court has made clear that one looks to the parcel "as a whole" in defining the relevant property for regulatory takings analysis.[13]

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[13] Petitioners' reliance (Pet. Br. 5) on the fact that for many years their tax assessments for Lots E and F were apparently

3. Nor, contrary to petitioners' repeated suggestion (Pet. Br. 5, 27), is there any reasonable basis for their reported surprise that the County's zoning ordinance treated commonly owned, adjacent substandard lots in this particular manner. The County drew the same distinction in the very first zoning ordinance that the County adopted in 1975 in response to the 1972 national legislation authorizing protection of the Lower St. Croix River.[14] The 1975 ordinance imposed a

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based on the incorrect assumption that the two lots were separately saleable or developable is entirely misplaced. Those tax assessments have no bearing on the merits of their takings claim. Tax assessors do not purport to be experts on what zoning restrictions in fact allow, which would require detailed expert inspection of the properties' physical characteristics; nor do they speak authoritatively for the zoning board and local government land-use officials. *Cf.* 5-22 *Nichols on Eminent Domain*, § 22.01 (2015) ("It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value for other than tax purposes."). Whenever a landowner believes that her land is being taxed at too high a rate, she can challenge an assessment and, if successful, obtain a lower assessment and pay lower taxes. *See District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 882 (CADC 1999) ("[A]ppellants retain the right to recombine the parcels and treat them as one property for the purposes of taxation * * *."). Wisconsin, like other States, provides property owners with the opportunity to contest tax assessments, and that is precisely what the petitioners did after losing their challenge to the County's denial of their variance application. Their two lots have been valued as a combined lot ever since. *See* J.A. 23, 24, 80.

[14] Further underscoring the longstanding nature of the County's distinct treatment of commonly owned, adjacent substandard lots, the County's zoning ordinance in 1967, eight years before the river valley restrictions were adopted, restricted its exemption for pre-existing lots served by a public sewer but not

minimum buildable acreage requirement of one acre and included a "special exception" from that requirement for lots, like petitioners', recorded before the new ordinance's adoption, so long as the "lands abutting the parcel in question are not under ownership or control of the applicant." Cty. Zoning Ord. § 3.10.8 (1975), App., *infra*, D1. And, even as the County modified the zoning ordinance's technical requirements somewhat over time, there was one constant: the exception for pre-recorded lots would not apply to substandard lots when the applicant owned an adjacent lot. *See* Cty. Zoning Ord. § 3.12.H.1 (1978), App., *infra*, D2 ("[Pre-existing substandard lots] may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant * * *."); Cty. Zoning Ord. § 17.36(5)(n)(1) (1986), App., *infra*, D3 (A requirement for a special exception is that "[t]he lot is in separate ownership from abutting lands or, if lots in an existing subdivision are in common ownership, each of the lots has at least one acre of net project area.").

Petitioners' stated surprise at learning that the County zoning ordinance treated commonly owned, adjacent substandard lots differently cannot therefore be fairly characterized as resulting from a lack of adequate notice. It is simply not true that petitioners "had every reason to understand that Lot E was separate

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meeting minimum size requirements "[i]f abutting lands and the substandard lot are owned by the same owner," and imposed limits on the substandard lots being "sold or used." St. Croix Cty. Zoning Ord. § 6.31(3) (1967).

and distinct from Lot F." Pet. Br. 29. The distinct treatment for substandard lots like theirs had been on the books for decades. *See* J.A. 67; pp. 41-45, *infra* (similar state and local laws are both longstanding and exist nationwide).

4. Petitioners have also not been singled out. The restrictions that apply to their property derive from the physical characteristics of their land. Petitioners' lots did not become substandard because the County imposed a minimum acreage requirement smaller than their lot sizes. Each lot is larger in size than the minimum acreage requirement and both lots instead became substandard because of their "unique terrain," which made most of their land unsuitable for development. App., *infra*, B4, B5.

The northern border for both lots is the ordinary high water mark of the St. Croix River and each lot is bisected by an exceedingly steep, nontraversable wooded slope leading to a 130-foot tall bluff. The proximity to the river presents significant flood risks (as experienced by petitioners on multiple occasions (*see* Pet. App. A4; J.A. 100-02)); and the bluff presents serious problems of erosion and stability. Indeed, the problems with petitioners' land for development are so great that petitioners still fall short of the one buildable acre minimum requirement even after combining the total buildable acreage available on both lots. The only reason petitioners are nonetheless permitted to replace their small, existing summer recreational cabin with a larger, new residence on their two lots is because of their entitlement to an exception for their

pre-recorded lots. *See* notes 4 & 10, *supra*. Petitioners therefore are beneficiaries of the same exception from the minimum acreage requirement that they claim unconstitutionally takes their property.

Petitioners are also not being treated any differently from their similarly situated neighbors.[15] As the Board explained in denying petitioners' application for a variance, "[a]t least eight other property owners in the immediate Cove Court/Court Road area own one or more contiguous substandard lots along the river with just one building site. Many of these contiguous lots are over two acres combined." J.A. 67. Because, moreover, the same merger rules apply up and down, and on both the Wisconsin and Minnesota sides of the St. Croix River, far more than just petitioners' immediate neighbors have been subject to the same restrictions. What would therefore be truly unfair would be to single out petitioners for special treatment—exempting them from generally applicable sale and development restrictions—while allowing petitioners to enjoy the increased property values that have resulted from

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[15] In the earlier litigation, petitioners complained that the County granted a hardship variance from the acreage requirement to a neighbor, who owned adjacent, substandard lots, and petitioners may raise that contention again here. The state court of appeals properly declined to consider that claim on procedural grounds (App., *infra*, A13) and, for that reason, the record in this case does not present the relevant facts, including that the neighbor presented a far stronger case for a hardship variance because, unlike petitioners, the neighbor did not have the option to build on the bluff above, owned only one substandard lot, and was not similarly seeking to build in a floodplain. In short, the neighbor lacked development options available to petitioners.

those very same restrictions on other landowners. *See* Brief of Carlisle Ford Runge, *et al.*, as *Amici Curiae*, Pt. V (describing increased property values enjoyed by petitioners because of zoning restrictions and corresponding windfall that would be gained by petitioners if they, alone, were exempted from buildable acreage requirement).

5. Finally, petitioners mischaracterize the state court's judgment as depending entirely on a *per se* rule of federal constitutional law that provides courts should always treat commonly owned contiguous parcels as the "parcel as a whole" in determining the landowner's economic burden in regulatory takings cases. Pet. Br. 13. As emphasized in the County's brief in opposition (Opp. 25-26) to the petition for certiorari, however, the state court of appeals' judgment below does not depend upon the sweeping, unqualified rule of federal constitutional law set forth in the petition's question presented. Both the court of appeals' reasoning and, in all events, its judgment are sufficiently supported by the merger rule's central role in defining petitioners' property. No more is needed.

The appellate tribunal below made clear from its very first sentences how it "agree[d] with the circuit court" that the County ordinance had "effectively merged" the petitioners' two adjacent lots. Pet. App. A1-A2. The court further found, based again on the ordinance's plain terms, that petitioners "never possessed an unfettered 'right' to treat the lots separately." *Id.* at A17-A18. This finding underscored the

unreasonableness of petitioners' placing such dispositive weight on the lot lines as a matter of state law. The legal significance of the County zoning ordinance, including its merger provision for commonly owned, adjacent substandard lots, was a central element of the lower courts' disposition of this case in both rounds of litigation and cannot be disregarded. None of that discussion of applicable state law would have been necessary or relevant had the state court been relying, as petitioners nonetheless assert, on a *per se* rule of federal constitutional law that defined the "parcel as a whole" regardless of state law.

Nor is the state court of appeals' ruling otherwise best understood as embracing a *per se* rule that commonly owned contiguous lots must always be aggregated in all regulatory takings cases regardless of any other factors and factual nuances. At most, the lower court was simply rejecting *petitioners'* proposed *per se* rule based on state lot lines, consistent with this Court's instruction to "resist the temptation to adopt *per se* rules" in regulatory takings cases. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002). In this particular case, moreover, there was directly applicable state law that flatly contradicted petitioners' reliance on state lot lines as the basis of their own *per se* rule. In other cases, as discussed below (*see* pp. 52-53, *infra*), courts properly consider a host of case-specific factors in determining the scope of the "relevant parcel" in assessing a regulation's economic impact. The courts of Wisconsin have not held to the contrary but, like

other federal and state courts, have engaged in case-specific inquiries turning on the particular facts and circumstances of each case. *See, e.g., R.W. Docks & Slips v. State*, 548 N.W.2d 785, 786-91 (Wis. 2001).

The County acknowledges that isolated language, largely limited to a single sentence within the state court of appeals' unpublished opinion, is nonetheless susceptible to a broader reading. The court's statement (Pet. App. A11)—that "[r]egardless of how that property is subdivided, contiguousness is the key fact under *Zealy* [*v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996)]"—could be misunderstood to mean that contiguous property should always be aggregated in defining the "parcel as a whole" in a regulatory takings case regardless of any other factors. As raised in the County's brief in opposition (Opp. 25-26), the County does not believe that is the better reading of the ruling of either the court of appeals in this case,[16] or of the Wisconsin Supreme Court in *Zealy*.[17] And, in all events, the

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[16] As described above, the lower courts' repeated emphasis on how the County ordinance effectively merged petitioners' two lots is inconsistent with the notion that those courts concluded that state law was irrelevant to the "parcel as a whole" issue. In addition, the court's reference to contiguousness as the "key fact" is far different from an unequivocal statement that contiguousness always defines the scope of a parcel of land in all takings cases. In this case, contiguousness was certainly the "key" fact because it triggered the County ordinance's merger provision. The word "key" also does not deny the possible relevance of other factors.

[17] Rather than relying on an inflexible categorical approach to all takings cases, the *Zealy* court is better understood as merely rejecting the particular reasons (accepted by the court of appeals

County does not defend the judgment on that broader reading of *Zealy*, but instead on the narrower grounds

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in that case) that the property owner proffered for defining the parcel more narrowly. That is why the state high court explained at some length the "possible difficulty in the application of the rule proposed by the court of appeals in the present case." 548 N.W.2d at 533. *Zealy* was also what petitioners themselves would characterize as a "segmentation" rather than an "aggregation" case. In *Zealy*, the takings plaintiff owned a single parcel consisting of 10.4 contiguous acres, with no suggestion in the opinion of further division into formal, distinct lots, and municipal zoning laws permitted development of some, but not all, of that parcel for residential purposes. The plaintiff argued that the courts should "take into account such factors as 'a landowner's anticipated investment opportunities * * * in order to determine what the parcel at issue should be." *Id.* at 532. In rejecting that claim, the *Zealy* court explained that "[l]ooking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim." *Id.* at 533. It "would confuse both the agencies responsible for zoning and the courts called on to adjudicate such claims, and increase the difficulty of an already complex inquiry." *Id.* The state court, accordingly, rejected the landowner's claim that it should consider exclusively the adverse economic impact of the development restriction on the value of the portion of the parcel on which residential development was not allowed, without also taking into account the value of the portion on which such development was permitted. Not only does *Zealy* clearly comport with this Court's own precedent, including *Penn Central* as petitioners themselves read it, because it would fit their definition of a "segmentation" case, but the ruling also makes obvious good sense. The *Zealy* court should not be misunderstood to have done anything more. That the County in litigation below pressed a broader argument, in addition to the narrow argument based on the merger provision, is also of no continuing significance. This Court reviews lower court reasoning and judgments, and not parties' unsuccessful legal arguments.

described herein that are fully supported by the record and this Court's precedent.[18]

B. Applicable State Law In This Case Is Consistent With Longstanding And Nationwide Practices Of State And Municipal Governments

1. The County did not originate the practice of treating commonly owned, adjacent substandard lots differently in determining the extent to which preexisting lots would be entitled to exemptions from subsequently established zoning requirements. The practice is longstanding and widespread. Often described as "merger provisions," state and municipal zoning laws across the nation have for almost a century drawn the very same distinction based on the fundamental fairness of identifying those most in need of a hardship exemption. They strike the balance between the community's interest in achieving the zoning requirement's important purposes and the landowner's interest in developing a substandard lot.

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[18] Should this Court disagree with our submission and conclude, contrary to our view, that the lower courts' judgment necessarily rests on an uncompromising *per se* definition of the "parcel as a whole" in takings cases and choose not to consider the readily available alternative, narrow bases for sustaining that judgment, the case should be remanded to provide the parties with the opportunity to litigate the proper basis for defining the parcel before the state courts in the first instance.

To be sure, the precise terms of those state and municipal laws differ at their margin in their particulars and their operation, underscoring the advantages of federalism. But their basic approach and underlying rationale are fundamentally the same in all their permutations. The owner of a nonconforming lot "is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance." 2 Robert M. Anderson, *American Law of Zoning*, § 8.49 (1968). As described by the Maine Supreme Court, a merger provision "is designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property." *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015).

2. An amicus brief filed in support of respondents by the State and Local Legal Center on behalf of the National Association of Counties and a host of other state and local governmental organizations fully documents the long and rich history of such state and municipal merger provisions. *See* Brief of Nat'l Ass'n of Counties, *et al.*, as *Amici Curiae*. Merger provisions can be found as early as 1926, and they became so common a few decades later as to be included in the Model Zoning Ordinance published by the American Society of Planning Officials in 1960. *Id.* at 9-10, *citing* American Society of Planning Officials, *The Text of a Model*

Zoning Ordinance, 26 (2d ed. 1960). Many States enacted statutes that specifically authorize municipalities to include merger provisions; in many States, local governments have adopted merger provisions based on general state legislative grants of authority; and in other States, merger is a common law doctrine that applies even in the absence of any formal state legislation. *See* Nat'l Ass'n of Counties Amicus Br. 12-14. The amicus brief lists illustrative examples of merger provisions from 132 municipal zoning ordinances located in 33 different States, crisscrossing the country from east to west and north to south. *Id.* at 14-31.

3. The prevalence of merger provisions is highly relevant to this case. First, it establishes their settled role in how States define the metes and bounds of private property rights in land, especially the limited legal import of lot lines as a matter of state law. Second, it makes clear that anyone remotely knowledgeable about land use law, including realtors, mortgagees, title companies, builders, and local counsel, knows the implications of owning adjacent, substandard lots. *See id.* at 32-34. The relevant law is therefore readily accessible to landowners, including petitioners and their parents, based on the exercise of the kind of minimal due diligence routinely engaged in by owners of real property who contemplate possible development possibilities and real estate transactions.

But even more fundamentally, the longstanding and widespread prevalence of merger provisions evidences why Wisconsin's treatment of commonly owned,

adjacent substandard lots, as reflected in both NR 118 and the County zoning ordinance, can fairly be considered part of what Justice Kennedy has described as "the whole of our legal tradition" upon which "reasonable expectations must be understood." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Merger provisions "are based on objective rules and customs that can be understood as reasonable by all parties involved." *Id.* The application of Wisconsin law accordingly supplies a proper base for defining the limits of petitioners' legitimate expectations in the use of their land, in the same manner that the Court held that Florida riparian law did in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. at 732. And invocation of Wisconsin state law to define those expectations is not akin to the far more sweeping categorical claim, rejected by this Court in *Palazzolo v. Rhode Island*, that a purchaser or successive title holder of property is deemed to have notice of any state law restrictions that pre-dated ownership and is therefore barred from claiming that any such restriction is a regulatory taking. *See* 533 U.S. at 626-27.

No doubt that is why no court has ever held in at least the one-hundred years that merger provisions like Wisconsin's have been around that they amount to an unconstitutional taking. In those rare instances when the argument has been made, courts have quickly dismissed the claim of unconstitutionality. *See, e.g., DiMillio v. Zoning Board of Review of the Town of South Kingston*, 574 A.2d 754, 757 (R.I. 1990) (rejecting takings claim because under the merger provision

"[t]he unimproved portion of petitioner's lot adds value to the lot with the existing dwelling, and the vacant lot remains available to enlarge the existing home"); *Quinn v. Board of County Comm'rs for Queen Anne's County, Md.*, 124 F. Supp.3d 586 (D. Md. 2014) (upholding merger provision).

C. The County Ordinance's Treatment Of Petitioners' Property Is Entirely Consistent With This Court's Regulatory Takings Precedent For Defining The Parcel

Merger provisions, like the County's here, are also in complete harmony with this Court's regulatory takings precedent. The Court has never intimated that a State lacks the power to decide as a matter of state law that lot lines are not controlling in such circumstances. And the state court of appeals' consideration of the value of Lot E combined with Lot F in evaluating the merits of petitioners' takings claim is in obvious accord with this Court's repeated admonition, beginning in *Penn Central*, that courts should consider the economic impact on the "parcel as a whole" in takings cases. 438 U.S. at 130-31.

1. The Court's seminal ruling on the so-called "denominator question" of regulatory takings law – regarding how to define the property for the purpose of assessing a regulation's economic impact – is, of course, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, the Court held that "'[t]aking' jurisprudence does not divide a single parcel

into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130. This Court "focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole.*" *Id.* at 130-31 (emphasis added); *see Concrete Pipe & Prods. of Calif., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 644 (1993) ("[W]e rejected this analysis six years ago in [*Penn Central*], where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."). While claiming to embrace *Penn Central*, petitioners seek to distinguish the *Penn Central* line of precedent based on their view that what *Penn Central* rejects is a court's *segmentation* of a discrete parcel of property into smaller parts, and that the Wisconsin courts misread *Penn Central* as requiring the *aggregation* of distinct parcels of property. *See* Pet. Br. 13-16. Petitioners' proffered distinction, however, is doubly flawed.

a. First, even if *Penn Central* could be so narrowly read (which we dispute below), the judgment of the state courts dismissing petitioners' takings claim does not depend on its broader reading. As described above (*see* pp. 28-32, *supra*), this is not a case where the courts unilaterally insisted on combining what were otherwise distinct parcels as a matter of state law. The opposite is true. The state courts in prior litigation squarely held that Lots E and F were not, as a

matter of state law, distinct parcels for the purposes of applying the County's minimum building acreage requirement. The two parcels had been "effectively merged" by state law for decades. Pet. App. A1-A2; App., *infra*, A10.

Contrary to petitioners' characterization, *Penn Central* is not therefore being invoked in this case to aggregate land that as a matter of state law constitutes two distinct parcels. State law has itself aggregated the two lots and petitioners now seek to segment into smaller pieces what state law has effectively defined to be the "whole parcel." But, of course, that is precisely what petitioners acknowledge the *Penn Central* Court clearly held should not be done.

b. The second flaw in petitioners' reasoning is that *Penn Central*'s rationale in favor of considering the "parcel as a whole" cannot in any event be fairly limited to so-called "segmentation" cases. The "fairness and justice" concerns underlying the Takings Clause, which support looking to the entire parcel, do not wholly disappear if the landowner's property consists of two adjacent lots.

Here too, petitioners overstate both the legal significance of lot lines, standing alone, and the meaningfulness of the segmentation/aggregation distinction. They also understate the logical reach of the Court's precedent.

i. In *Penn Central*, the Court rejected the property owner's claim that regulatory takings analysis should separate out from their parcel of land their "use

of air rights * * * irrespective of the impact of the restriction on the value of the parcel as a whole." *Id.* at 130 n.27. Although petitioners dub this a "segmentation" case, the Court can no less fairly be understood to have aggregated the air rights and the surface development rights in assessing the economic impact of the land use restriction on the owner's entire parcel as a whole. *Cf. Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring) (emphasis added) ("[In *Penn Central*, t]he relevant land, it could be said, was the *aggregation* of the owner's parcels subject to the regulation (or at least the contiguous parcels) * * *."). Significantly, the air rights at issue in *Penn Central* were an exceedingly valuable property right distinct from the surface development rights, and they could be separately bought and sold under state law.

ii. Similarly, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Court held that the coal required to be left in the ground did "not constitute a separate segment of property for takings law purposes." *Id.* at 498. According to the Court, it was not preclusive of defining the parcel more broadly that applicable state law recognized a separate interest in land, known as the support estate, which could be conveyed separately: "[O]ur takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500. While certainly not denying the relevance of all state law in determining the bounds of takings analysis, the Court rejected the notion that "whether state law allowed the

separate sale of the segment of property" necessarily narrowed the "parcel" for takings purposes. *Id.* Here again, the Court aggregated the surface and support estates even though state law recognized them as distinct rights and estates. The Court therefore did not treat a state law determination that property rights could be severed as meaning that those severed interests could not also be aggregated in determining what constitutes the "parcel as a whole" for regulatory takings purposes.

iii. *Palazzolo v. Rhode Island*, decided in 2001, is, moreover, squarely on point and directly contradicts petitioners' reliance on lot lines. The plaintiff landowner in that case claimed that a state wetlands regulation amounted to an unconstitutional taking of his property without compensation. 533 U.S. at 611. In rejecting that claim, the Court relied on the fact that it was undisputed that the landowner could build a house on one small upland portion of his 20 acres and the value of that development was sufficient to defeat the claim of a *per se* taking under *Lucas*. *Id.* at 631. The Court reached this result even though it was undisputed that the 20 acres consisted of 74 distinctly platted subdivision lots previously approved by the State. *Id.* at 613, 616, 623. The Court never intimated that the existence of the 74 individual lots was inconsistent with treating the landowner's 20 acres as the "entire parcel." *Id.* at 631-32.

Nor is the *Palazzolo* Court's description of the 74 individual lots as the "entire parcel" at all undercut by its refusal to consider the landowner's belated claim in

that case that the Court should ignore the value of that upland parcel in determining whether the non-uplands portion had been taken. While declining to do so because the landowner had failed to press the issue in his jurisdictional petition (*id.*), the Court simultaneously made clear that the landowner's procedural shortfall had been his failure to challenge the "parcel as a whole rule" altogether—a rule with which the Court suggested it had "at times expressed discomfort." *Id.* at 631. The Court did not question that if the parcel as a whole rule applied, then the entire 20 acres, including all 74 lots, constituted the "entire parcel" under the logic of *Penn Central*. *Id.* at 631-32. At the very least, the Court in *Palazzolo* did not grasp, let alone embrace, what petitioners now assert is a limiting principle long hidden within *Penn Central*.

iv. The Court's more recent endorsement of the "parcel as a whole rule" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), similarly resists the aggregation/segmentation distinction. In arguing that a temporary moratorium on land use development amounted to an unconstitutional taking requiring the payment of just compensation, the plaintiff landowners contended that the Court should focus only on that time period when the moratorium applied, effectively severing the property temporally for the purpose of takings analysis. *Id.* at 320. Once again, the Court squarely rejected the propriety of such a conceptual severance. *Id.* at 331. It was no matter that state law would have permitted a landowner to create a distinct property interest in the

land of a temporal nature, such as a leasehold. Petitioners can characterize that as a refusal to "segment" the property temporarily, but it is no less a ruling by the Court that those distinct state law property interests defined by discrete segments of time should be "aggregated" in considering the economic impact of the land use restriction on the "parcel as a whole."

2. Lot lines are, at bottom, no different from any of these other ways to carve up a property owner's interest in land or other types of property, whether spatially, temporally, horizontally, or vertically. Like air rights, support estates, and leaseholds, lot lines do not conclusively—or as proposed by petitioners, presumptively—define the "parcel as a whole" for regulatory takings analysis. Indeed, were the rule otherwise, one could fairly anticipate that owners of property would quickly respond by dividing property rights, including in land, into ever smaller "parcels" to maximize their takings claims at the expense of the government's police power. *See City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) ("[T]he government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis."). Neither the Fifth Amendment's concerns with "justice" nor its commitment to "fairness" would be served by a federal constitutional rule of law that encouraged such manipulative behavior and self-created hardships. *See Bevan v. Brandon Twp.*, 475 N.W.2d 37, 43 (Mich. 1991), quoting *Korby v. Redford Twp.*, 82 N.W.2d 441, 443 (Mich. 1957) (explaining that perverse results would

occur if "'[a]rtificial device[s]' such as tax identification numbers and separate deeds" controlled takings analysis because "it would be competent for landowners to perpetually defeat future zoning restrictions by criss-crossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others" (second alteration in original)).

3. Does this mean that lot lines are wholly irrelevant in defining the relevant "parcel as a whole" in takings analysis? Or that contiguous, commonly owned parcels are always merged for takings purposes under every possible factual scenario? Of course not. That is not the County's position before this Court. As a general matter, a court in a takings case should consider many factors, including lot lines, in deciding the shape of a property owner's reasonable expectations.

For land, as courts have held, relevant factors include, but are not necessarily limited to, the extent to which parcels are contiguous, ownership history, physical characteristics, unity of use, the extent to which the restricted portion benefits the unregulated portion, and how the government, including state and local governments have treated the land. *See, e.g., District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 880-82 (CADC 1999). As the state court of appeals explained, however, those factors relevant "to determining the extent of the property at issue for purposes of a regulatory taking" do not extend to "[a] property's owner's subjective, desired use." Pet. App. A17 n.8.

The undisputed facts of this case allow for the sensible result achieved by the lower courts. Petitioners' case rests entirely on their insistence that the lot lines established under state law are controlling, on at least a presumptive basis, in defining their property. Such a claim, however, is legally untenable where, as in this case, the state courts have already ruled as a matter of state law in prior litigation that the lot lines do not have the significance that petitioners ascribe to them. The lot lines do not override state law in existence for decades that makes clear that commonly owned, adjacent substandard lots are effectively merged in applying the minimum buildable acreage requirement. Nor does the Takings Clause override a State or local government's decision in this regard and, in effect "dictate to the States [how] their general laws of property * * * are to be construed." Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 William & Mary L. Rev. 301, 327 (1993). For that same reason, even if contrary to our submission, the Court were to conclude that lot lines presumptively define the "parcel as a whole" in takings analysis, any such presumption would clearly be defeated in this case by Wisconsin law.

D. The State Courts Below In All Events Properly Declined To Consider Petitioners' Ownership Of Lot E In Isolation From Their Ownership Of Lot F In Granting Summary Judgment In Favor Of Respondents

Finally, the parcel as a whole inquiry in this case is, in all events, largely a red herring. No matter how one formally defines the parcel in this case, whether one treats Lots E and F somehow as distinct "parcels as a whole," as petitioners contend, or treats Lots E and F together as the "parcel as a whole," as the lower courts ruled, the result in this case would be exactly the same. Petitioners would still have failed to make a sufficient showing of adverse economic impact from the restrictions on separate sale and development to defeat the County's motion for summary judgment. And affirmance of the judgment of the state court of appeals would be no less warranted.

1. The state appellate court affirmed the trial court's grant of respondents' motion for summary judgment. The gravamen of both the state trial court's and the court of appeals' rulings was the same: petitioners' failure to raise any genuine issues of material fact regarding their economic losses sufficient to maintain their claim that Lot E had been taken. Pet. App. A12-A18, B9. Both courts found that petitioners' economic losses from the restriction on separate sale and development fell far short of that mark: less than a ten percent reduction. Lots E and F are worth $698,000 if petitioners are permitted to build only one house on

the two lots combined, rather than $771,000 if petitioners were permitted to build a house on each lot. *Id.* at A6, A15-A16, B9.

Petitioners contend that the state courts erred by defining the relevant parcel for takings purposes to include both Lots E and F, rather than just treating Lot E by itself as the relevant parcel. For the reasons discussed at length above, petitioners are incorrect. Because of the County zoning ordinance's longstanding merger provision, the state courts properly applied this Court's precedent by combining petitioners' adjacent, substandard lots in assessing the extent of their economic loss for regulatory takings purposes. But, even assuming petitioners were correct, the result in this case would be no different, because the economic impact of the sale and development restrictions on petitioners' property ultimately turns not on how one defines the parcel, but on the uses of Lots E and F that the County zoning ordinance in fact permits. *Cf.* Pet. App. A13 ("We are not concerned with what uses are prohibited * * *[,] but rather only what use or uses remain.").

2. As explained by the state courts below (Pet. App. A6, A12-A13, B9), the County zoning ordinance allows petitioners to replace the existing recreational summer cabin with a larger, far nicer year-round house on Lot E alone or on land straddling both Lots E and F. In either of those circumstances, such a house would plainly be very valuable. But even if petitioners chose to build the new home solely on Lot F, combining that

house with the land located on Lot E would add significant value to petitioners' property. For the reasons detailed by the County's expert appraiser (J.A. 15-60), the value of a larger house on a larger lot that includes the longer stretch of St. Croix River beachfront provided by Lot E would be almost as much as the sum of the value of the two lots assuming each was separately developable. The difference in value, which the state courts below both concluded was not a genuinely disputed issue of material fact, would be a ten percent reduction: from $771,000 to $698,000. Pet. App. A15-A16, B9; App., *infra*, G3-G4; *see* pp. 17-20 & note 12, *supra*.

Why is the reduction in value so relatively small? The appraiser's explanation, supported by both the lower state courts' findings, is simple. Lot E, unlike Lot F, has far more beachfront (roughly twice the amount) to offer. A single residence on combined Lots E and F would therefore have the benefit of both the larger lot and the increased beachfront, privacy, and prestige, whether the house was placed on Lot E, Lot F, or across both. J.A. 32-33, 45-59; *see* note 12, *supra*.

How a court chooses to define "the parcel" for regulatory takings analysis will not change any of those numbers. Even if, as the County ordinance provides, Lot E's value is derived from its potential to be combined with Lot F (the same way that Lot F's is derived from Lot E), that is still significant market value. The "parcel as a whole" inquiry does not change the basic underlying economics of market valuation. Lot E is worth less, but it still retains significant economic value when combined with Lot F.

3. At bottom, petitioners' mistake lies in their erroneous economic assumption that if Lot E cannot be sold or developed at all apart from Lot F, then it must be worth nothing. But that is not how economics and market valuation of property work in practice. Merely because Lot E cannot be sold or developed in isolation of Lot F does not mean that it does not retain, as far as the market is concerned, significant economic value precisely because it can be developed in conjunction with Lot F and its added beachfront and acreage contribute enormous economic worth. *See* note 12, *supra*. Petitioners' contrary view depends on hypothetical facts that, ignoring the actual terms of the ordinance, falsely assume petitioners have no use of Lot E at all. *See* Pet. Br. 9.

The courts below therefore correctly rejected petitioners' argument and concluded that petitioners' own expert failed to raise a genuine issue of material fact sufficient to call into question the opinion of the County's expert witness that the adverse economic impact of the County zoning ordinance was less than a ten percent reduction in total market value. *See* App., *infra*, G3 ("[R]eliance on appraisal values that consider only a portion of the Murrs' property do[es] not create a genuine issue of material fact."). The trial court, moreover, found further, independent fault with petitioners' expert witness. In denying petitioners' motion for reconsideration, the court found that the views of petitioners' expert were not entitled to weight because they were not based on data related to fair market value at all, but "only assessment data." *Id.* at G4. The

court noted that "[p]etitioners[] have not cited legal authority that would create a genuine issue of material fact, specifically where [petitioners' expert], stated he had no information as to the effect on fair market value." *Id.* These findings are fatal to the merits of petitioners' takings claim regardless of how one defines petitioners' parcel for takings analysis purposes.

* * * * *

As in *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the County zoning ordinance challenged in this case represents a responsible exercise of a local government's police power addressing "the complex conditions of our day." *Id.* at 387. The ordinance neither goes "too far," within the meaning of Justice Holmes' famous (albeit characteristically cryptic) formulation in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922), nor otherwise implicates the Fifth Amendment's bottom-line concerns with ensuring "fairness and justice" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The state courts properly dismissed petitioners' takings claim on summary judgment.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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June 10, 2016

APPENDIX A

COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2011

Appeal No. 2008AP2728

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DONNA J. MURR,

PETITIONER-APPELLANT-
CROSS-RESPONDENT,

v.

ST. CROIX COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT-
CROSS-APPELLANT,

STATE OF WISCONSIN,

APPELLATE-INTERVENOR-
RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: EDWARD F. VLACK, III, Judge. *Affirmed in part*; *reversed in part.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶ 1 HOOVER, P.J. Donna Murr appeals a circuit court judgment that affirmed in part, and reversed in part, a St. Croix County Board of Adjustment decision

denying Murr's request for six variances and two special exception permits. The Board and the State of Wisconsin (collectively, the Board) cross-appeal.[1]

¶ 2 Murr argues a St. Croix County ordinance that mirrors WIS. ADMIN. CODE § NR 118.08(4) does not apply to merge her two contiguous parcels, because the parcels did not come under common ownership until after the effective date identified in the ordinance.[2] We disagree and conclude the ordinance applies to all abutting properties that existed on the specified date, regardless of when they come under common ownership. We therefore affirm the portion of the judgment affirming the Board's decision on that issue.

¶ 3 In its cross-appeal, the Board asserts its decision was proper in all respects and contends the circuit court applied an incorrect standard of review, substituting its judgment for that of the Board. We agree and reverse the portion of the judgment reversing the Board's decision.

BACKGROUND

¶ 4 Murr's parents purchased a lot on the St. Croix River in 1960. After building a cabin near the river, they transferred title to their plumbing company. In 1963, Murr's parents purchased an adjacent lot,

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[1] The State has intervened on appeal.

[2] All references to WIS. ADMIN. CODE ch. NR 118 are to the June 2006 version.

which has remained vacant ever since. The approximately one and one-quarter acre lots are moderately level at the top and at the river, but are bisected by a steep 130 foot bluff, with the top and bottom of the lots being served by separate roads. The two lots contain approximately .48 and .50 acres of net project area.[3] The lots were transferred to Murr and her siblings in 1994 and 1995.[4]

¶ 5 Due to repeated flooding, Murr sought to reconstruct the cabin on higher ground by using fill. She initially planned to build in the same location. However, as suggested by a town planning commission, Murr ultimately requested to build further from the river to reduce the environmental impact. Murr requested the following eight variances or special exception permits: (1) variance to sell or use two contiguous substandard lots in common ownership as separate building sites; (2) variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) variance to fill, grade, and place a structure in the slope preservation zone; (4) special exception to fill and grade within forty feet of the slope preservation zone; (5) special exception to fill and grade more than 2000 square feet; (6) variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) variance to reconstruct a patio within the

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[3] "'Net project area' means developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." WIS. ADMIN. CODE § NR 118.03(27).

[4] As Donna Murr is the only named party, we refer to her singly in this decision.

ordinary high-water mark setback; and (8) variance to construct a deck within the ordinary high-water mark setback.

¶ 6 The Board conducted a public hearing at which the DNR and county zoning staff opposed Murr's application. The Board denied all of Murr's requests in a written decision. Murr sought WIS. STAT. § 59.694(10)[5] certiorari review before the circuit court. After hearing arguments and viewing the property, the circuit court affirmed the Board's denial of Murr's request to sell or use the two lots as separate building sites. However, the court reversed the Board on the remaining seven requests. Murr now appeals, and the Board cross-appeals, the circuit court decision.

DISCUSSION

¶ 7 Certiorari review under WIS. STAT. § 59.694(10) is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence. ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989).

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[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Merger of Lots

¶ 8 Murr asks us to interpret ST. CROIX COUNTY, WI. CODE OF ORDINANCES, LAND USE AND DEVELOPMENT, SUBCHAPTER III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36I.4.a. (July 1, 2007), and decide whether it applies to her situation.[6] Murr's challenge appears to question whether the Board proceeded under the correct theory of law.[7]

¶ 9 The rules for construction of statutes and ordinances are the same. ***Sauk County v. Trager***, 113 Wis. 2d 48, 55, 334 N.W.2d 272 (Ct. App. 1983). Statutory interpretation presents a question of law that we decide without deference to the trial court's decision. ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶16, 290 Wis. 2d 421, 714 N.W.2d 130. The purpose of statutory interpretation is to determine what a statute means in order to give the statute its full, proper, and intended effect. ***Id.*** Generally, language is given its common, ordinary, and accepted meaning. ***Id.*** In addition, statutory language is interpreted in the context in which it is used, in relation to the language of surrounding or closely related statutes,

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[6] Murr also argues the Board improperly found that the two contiguous properties were under common ownership on the effective date specified in the ordinance. The Board concedes in its brief that the properties were separately owned until after that date.

[7] While Murr challenges the ordinance's application to her, she does not argue the Board erred by denying a variance if the ordinance applies.

and interpreted to avoid absurd or unreasonable results. *Id.*

¶ 10 WISCONSIN STAT. § 30.27(1), consistent with federal code provisions identified therein, recognizes the Lower St. Croix River as part of the national wild and scenic rivers system. Subsection 30.27(2) requires the DNR to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Subsection 30.27(3), in turn, requires all affected municipalities to adopt ordinances at least as restrictive as those adopted by the DNR. St. Croix County adopted an ordinance essentially mirroring WIS. ADMIN. CODE § NR 118.08(4). The ordinance provides:

> (4) **SUBSTANDARD LOTS** Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or

> developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

ST. CROIX COUNTY, WI, CODE OF ORDINANCES, LAND USE AND DEVELOPMENT, SUBCH. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36I.4.a. (July 1, 2007) (internal lettering and numbering modified);[8] *see also* WIS. ADMIN. CODE § NR 118.08(4).

¶ 11 Murr argues that any existing substandard lot that was not under common ownership on January 1, 1976, remains forever exempt under the ordinance, regardless of whether it subsequently comes under common ownership with an abutting lot. Murr asserts this case involves the doctrine of merger, and relies on principles of law set forth in treatises, *see* 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 49.13 (4th ed. 2008); 2 ANDERSON'S AMERICAN ZONING § 9.67 (4th ed. 2006), and foreign state cases. Based on those authorities, Murr contends the ordinance was required to include an "explicit merger clause." We reject Murr's reliance on nonbinding authority to create ambiguity in the ordinance. The administrative code provision on which the ordinance is based is not a model of clear

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[8] The internal paragraph lettering and numbering of the ordinance is illogical and potentially confusing. Therefore, we have substituted that of the administrative code. The paragraph structure is the same in both provisions.

draftsmanship. Nonetheless, we discern no ambiguity in its application here, and we reject as unreasonable Murr's interpretation that the ordinance applies only to lots that were under common ownership on the effective date.[9]

¶ 12 Paraphrased, the first paragraph of the ordinance states: "Lots that are already in existence (i.e., those on record with the register of deeds) when the riverway district ordinance declares them substandard may be allowed as building sites if the following criteria are met." Nothing in that paragraph ties either the initial January 1, 1976 effective date or potential future effective dates to the subsequently listed criteria. The date simply establishes the point in time by which the lot must have been recorded to be eligible under

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[9] We observe, however, that the ordinance and WIS. ADMIN. CODE § NR 118.08(4)(a)2. appear to prohibit any building when, *as here*, two substandard, commonly owned lots combined still contain less than one acre of net project area. Yet, subd. (a)1. would permit building on both lots if they were separately owned, regardless of their individual amounts of net project area. This would lead to the seemingly absurd result that an owner of two adjacent properties would be prevented from building even one home, while an owner of a single substandard lot would be entitled to build. We assume without deciding that subd. (a)2. intends that where multiple abutting lots are commonly owned, individual lots must be merged into a single building site until at least one acre of net project area is attained, but that if all commonly owned lots do not contain the minimum net project area, they shall together suffice as a single buildable lot. This assumption is significant to our interpretation of the subsection's manifest intent.

the subsection's exception for building on substandard lots.

¶ 13 Accordingly, neither subds. (a)1. or (a)2., which are specifically at issue in this case, refer to any particular date. Moreover, these subdivisions utilize the present tense. If the DNR or local zoning authority had intended these provisions to apply only to the facts as they existed on the effective date, then they likely would have said so, and would have used the past tense.[10] Use of the present tense, on the other hand, indicates the criteria are to be applied to the state of facts existing at the time an owner seeks to sell or build.

¶ 14 Our interpretation is also consistent with the manifest intent of the ordinance and WIS. ADMIN. CODE § NR 118.08(4), to preserve property values while limiting environmental impacts. The stated purposes of the riverway district ordinances and ch. NR 118 are to:

> (1) Reduc[e] the adverse effects of overcrowding and poorly planned shoreline and bluff area development. (2) Prevent[] soil erosion and pollution and contamination of surface

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[10] Thus, for example, to be interpreted as Murr suggests, subd. (a)1. of the ordinance would have instead stated, "The lot [was] in separate ownership from abutting lands [on the effective date]. . . ." Similarly, subd. (a)2. would have stated: "The lot . . . or lots under common ownership . . . [had] at least one acre. . . . Adjacent substandard lots [that were] in common ownership [on the effective date] may only be . . . developed . . . if each . . . [had] at least one acre of net project area [on the effective date]. *See also* WIS. ADMIN. CODE § NR 118.08(4).

> water and groundwater. (3) Provid[e] sufficient space on lots for sanitary facilities. (4) Minimiz[e] flood damage. (5) Maintain[] property values. (6) Preserv[e] and maintain[] the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway. . . .

ST. CROIX COUNTY, WI, CODE OF ORDINANCES, LAND USE AND DEVELOPMENT, SUBCH. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36B.1.a. (July 1, 2007); WIS. ADMIN. CODE § NR 118.01; *see also* WIS. STAT. § 30.27(1) (purpose is "to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations"). We agree with the State that the intent of the exception for existing lots is to "protect[] people who acquire the property before the ordinance was passed from being deprived of their property value." When the provision became effective, every person who already owned a lot could still build. If the lot was too small under the new rule, that was acceptable; owners could still build on their lot or sell it as a developable lot. However, if the substandard lot owner owned an adjacent lot as well, then the lots were effectively merged and the owner could only sell or build on the single larger lot. This result preserved both property values and the environment.

¶ 15 Murr's interpretation is inconsistent with the manifest intent of the ordinance and WIS. ADMIN. CODE § NR 118.08(4) because it (1) does nothing to

preserve property values, (2) unnecessarily and arbitrarily provides greater rights to subsequent substandard lot owners than to those who owned at the time of the provisions' effective date, and (3) fails to preserve the visual and ecological environment.

¶ 16 Because the provisions are already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized.

¶ 17 Further, because Murr is charged with knowledge of the existing zoning laws, *see* ***State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee***, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965), as a subsequent owner she was already in a better position than any person who owned at the provisions' effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

¶ 18 Finally, merger of adjacent substandard lots that come under common ownership will preserve the environment in the same ways that merger of lots already under common ownership would do. The failure

to merge would have the opposite effect, with no countervailing property value concern.[11]

Cross-appeal opposing circuit court order to grant variances and special exceptions

¶ 19 The Board argues that the circuit court improperly substituted its judgment for that of the Board, and that the Board's denials of Murr's variance and special exception requests must be affirmed under the proper standard of certiorari review.[12] *See* ***Klinger***, 149 Wis. 2d at 843. As a general rule, in certiorari proceedings the appellate court reviews the decision of the agency, not the circuit court. ***Id.*** at 845 n.6, 846.

> [WISCONSIN STAT. § 59.694(10)] explicitly allows, however, the circuit court to take evidence "if necessary for the proper disposition of the matter." The statute thus broadens the scope of review by way of certiorari by granting the circuit court discretion to take and consider evidence when it shall appear "necessary" to do so.

Id. at 846.[13] Nonetheless, if the circuit court takes evidence that is substantially the same as that taken by

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[11] The Board's response brief repeatedly refers to Murr as plaintiff. We remind counsel that references should be to names, not party designations. *See* WIS. STAT. RULE 809.19(1)(i).

[12] The Board did not file its own cross-appeal brief. Instead, it adopted the arguments set forth in the State's cross-appeal brief.

[13] ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989), involved WIS. STAT. § 59.99(10) (1987-88),

the Board, deference to the Board demands that the evidentiary hearing should be treated as a nullity for purposes of determining the standard of review to be applied to the Board's decision. ***Id.*** at 845.

¶ 20 Here, the circuit court supplemented the Board record in two respects: it viewed the property and it received the Board's record concerning a variance request recently granted to a neighboring property owner. The State contends the evidence the court received was substantially the same as the evidence received by the Board and should therefore not affect the standard of review.

¶ 21 We agree the property viewing added nothing new to the evidentiary record because the Board too had visited the property. *See* ***Block v. Waupaca Cnty. Bd. of Zoning Adjust.***, 2007 WI App 199, ¶4 n.5, 305 Wis. 2d 325, 738 N.W.2d 132. We also agree that the circuit court's review of the neighbor's record did not constitute a proper basis on which the court could rely to substitute its judgment for that of the Board. *See* ***Miswald v. Waukesha Cnty. Bd. of Adjust.***, 202 Wis. 2d 401, 413-14, 550 N.W.2d 434 (Ct. App. 1996) (board of adjustment's treatment of a different property owner's variance request cannot render its action arbitrary, oppressive, or unreasonable).

¶ 22 We therefore apply the ordinary certiorari standard of review. *See* ***Klinger***, 149 Wis. 2d at 843. Murr argues the Board's decision was not reasonably

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which has been renumbered to WIS. STAT. § 59.694(10). *See* 1995 Wis. Act 201, § 479.

supported by the evidence because "the interplay of several regulations makes it impossible for the Murrs to floodproof the cabin without some type of variance or special exception permit." We conclude, however, that Murr's requests to relocate and rebuild her home in a new location were simply a matter of convenience. Personal inconvenience alone does not constitute the unnecessary hardship required to grant variances. *See* ***Snyder v. Waukesha Cnty. Zoning Bd.***, 74 Wis. 2d 468, 474-75, 478-79, 247 N.W.2d 98 (1976).

¶ 23 As the Board emphasizes, the record shows Murr could have floodproofed her current home in its existing footprint. In fact, the Board lays out two alternatives that were available to Murr, and that were presented to her early in the process. One alternative, to floodproof and remodel the existing home, would not have required any variances or special exception permits. The second, whereby Murr would demolish and reconstruct her home atop fill, would have required only two special exception permits and one variance, as compared to the seven variances or special exceptions required under her current plan.[11] Moreover, because Murr never sought the variance and special exception permits required for the second alternative, those requests are not before us for review.

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[11] Murr's eighth request, to separately develop or sell her two substandard lots, was independent of the requests necessary to relocate and reconstruct her home.

¶ 24 "We accord a presumption of correctness and validity to the decision of the board when reviewing a decision by statutory certiorari." ***Miswald***, 202 Wis. 2d at 408. Here, there was ample evidence on which the Board could reasonably rely to deny Murr's requests. *See* ***Snyder***, 74 Wis. 2d at 476 (board's findings may not be disturbed if any reasonable view of the evidence sustains them).

By the Court. – Judgment affirmed in part; reversed in part.

Recommended for publication in the official reports.

APPENDIX B

STATE OF WISCONSIN	CIRCUIT COURT	ST. CROIX COUNTY

DONNA J. MURR,

Plaintiff,

v.

ST. CROIX COUNTY BOARD OF ADJUSTMENT,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Case No. 06 CV 545

(Filed Aug. 18, 2008)

This matter came before the Court on a review of a decision of the St. Croix County Board of Adjustment. The record of the Board's proceedings was duly filed with the Court. The Court visited the property on April 4, 2007 and it reviewed the zoning department's file concerning the approval of variances for the Opitz property, which is adjacent to the Plaintiff's.

Based on the Court's review of the record and the written arguments of counsel, the Court makes the following Findings of Fact, Conclusions of Law and Order:

1) Plaintiff Donna Murr, along with her brothers and sister, (collectively referred to as the Murrs) own two residential lots in the St. Croix Cove Subdivision, Town of Troy, Wisconsin. The lots were platted before enactment of NR 118 and the County's Riverway Ordinances.

2) The recorded plat labels the Murrs' lots as Lot E (designated as Parcel "A" on the December 1, 2005 Map of Survey) and Lot F (designated as Parcel B" [sic] on the same Map of Survey). Both lots are approximately 1 1/4 acres, and they have similar terrain. The lots are bisected by a steep, wooded bluff, approximately 130 feet high. The bluff-face on the Murrs' property is not traversable by vehicle or foot, Moderately level areas exist at the bottom of the bluff near the river and at the top of the bluff.

3) Lot E is vacant. Lot F is improved with a summer home/cabin. The cabin is situated at the bottom of the steep bluff and is located approximately 100 feet from the ordinary high water mark. The location and use of the Murrs' cabin is consistent with other dwellings in the subdivision.

4) The cabin is considered a non-conforming structure under the NR118 and Riverway Ordinances currently in effect,

5) The cabin lot (Lot F) was transferred to the Murrs in 1994. The vacant lot was transferred to the Murrs in 1995.

6) Over the years, the summer home/cabin was damaged by floods from the St. Croix River.

7) The Murrs had consulted with the County Zoning Department regarding ways that the cabin could be flood proofed. The Murrs eventually sought approval for plan to elevate the cabin on fill on the

existing footprint. Certain variances and special exception permits were needed for aspects of the Murrs' flood proofing plan that went beyond the methods mentioned in St. Croix County Ordinance section 17.40D(5)(d).

8) The plans evolved after the Town of Troy Planning Commission recommended reconstruction of the Murrs' cabin on a footprint approximately 40 feet behind its current location. The proposed building site was farther from the river and situated at a higher elevation, requiring significantly less fill and excavation. The proposed plan would not require the removal of trees or result in the destruction of trees or vegetation. The cabin would be situated higher in the tree-line, further obscuring it from visibility. The Murrs submitted formal plans incorporating the Town's recommendation to the Board of Adjustment for approval of the following:

a) Variance to sell or use the adjoining vacant lot as a separate building site;

b) Variance to reconstruct and expand a nonconforming structure outside its original footprint;

c) Variance to fill, grade, and place a structure in the slope preservation zone;

d) Special exception permit to fill and grade within 40 feet of the slope preservation zone;

e) Special exception to fill and grade more than 2,000 square feet;

f) Variance to construct retaining walls and stairs inside the ordinary high-water mark setback;

g) Variance to reconstruct a patio within the ordinary high-water mark setback; and

h) Variance to construct a deck within the ordinary high-water mark setback.

9) The Board denied the Murrs' application for the reasons set forth in its written decision.

10) The Murrs commenced this action on July 25, 2006 seeking review of the Board's decision pursuant to Wisconsin Statute section 59.694(10). The Murrs and the Board submitted briefs.

11) On April 4, 2007, the Court and counsel for the Murrs and the Board visited the Murr property. During that visit, the Court saw the Opitz property, which became a significant factor in the Court's decision. Afterwards, the Court took judicial notice of the zoning department's file concerning the Opitz property and the variances that were granted to allow the Opitzes to construct a dwelling at the bottom of the bluff, comparable to the Murrs' proposal.

12) The Court finds that the Murrs suffer from a hardship because the unique terrain, limited building area and ongoing flooding make literal conformity to the zoning ordinances to be unreasonable and unnecessarily burdensome.

13) The Court finds that is unreasonable to expect the Murrs to do nothing with their cabin and allow

it to continue to flood in its present location. The Murrs cannot flood proof the cabin on its existing footprint beyond the methods mentioned in St. Croix County Zoning Ordinance section 17.40 D(5)(d) without some type of variance being granted. Similarly, the Murrs cannot reconstruct and flood proof the cabin on a different footprint at the bottom of the bluff without zoning variances.

14) Given the steep bluff, unique terrain, configuration of the lots and limited access ways, it is unreasonable and unnecessarily burdensome to force the Murrs to change the use and characteristics of the cabin and lose the benefits of having a cabin near the water (like most other properties in the St. Croix Cove) by building on top of the bluff for the sake of complying with the strict letter of the zoning restrictions.

15) The Court also finds that the county granted permission to the Opitzes to build a dwelling along the river in a similar location as the Murrs propose. For the reasons set forth in its written decision, the county granted the Opitzes similar types of variances that the Murrs requested. Based on observations made during the April 4 visit and the review of the Opitz zoning file, the Court finds that it was unreasonable for the Board to regard the Murrs' proposed plans inconsistent with the objectives and spirit of the Riverway Ordinances when the Opitzes were granted variances to build a similar structure in a similar location.

16) The Court finds that given the unique terrain of the Murrs' property, the Murrs' building proposal is

reasonable. In addition to protecting the cabin against floods, the building plan will bring the property more into compliance with the Riverway Ordinances and will promote the spirit and purpose of the ordinances by increasing the cabins' distance from the water, by removing the cabin from the flood plain, by reducing the need for excavation and fill at the building site, and by preserving the existing vegetation along the riverfront.

17) Therefore, the Court finds that the Murrs suffer from an unnecessary hardship because the Murrs were unable to protect their property against floods and comply with the strict letter of the zoning restrictions. The Court further finds that it would be unnecessarily burdensome to require the Murrs to build on top of the bluff in order to conform to the zoning restrictions. The Board erred when it denied the application as it relates to the variance requests identified above in Paragraph 8(b) through (h). The Court reverses the Board's decision on those items and directs the variances and permits to be issued.

18) The Court affirms the Board's denial of the Murrs' request to sell or use the adjoining vacant lot as a separate building site, identified above in Paragraph 8(a). The lots came into common ownership after the Riverway Ordinances were enacted, and the Board correctly interpreted the ordinance to prohibit the separate sale or use of subsized lots that are held in common ownership. That aspect of the Board's decision is affirmed.

19) This is a final order for purposes of appeal.

Dated: 8/15/08

BY THE COURT:

/s/ Edward F. Black

HONORABLE
EDWARD F. BLACK
Circuit Court Judge
St. Croix County, Wisconsin

APPENDIX C

ST. CROIX COUNTY CODE OF ORDINANCES LAND USE AND DEVELOPMENT

[Version in effect in 2006]

CHAPTER 17
ZONING

SUBCHAPTER I

GENERAL PROVISIONS

* * *

17.09 DEFINITIONS.

This section contains brief definitions of key words and phrases used throughout this chapter.

* * *

135. **Net Project Area:** Developable land area minus slope preservation zones, floodplains, road rights-of-way, and wetlands.

* * *

232. **Unnecessary Hardship:** Where special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions governing areas, setbacks, frontage, height or density unnecessarily burdensome or unreasonable in light of the purposes of this ordinance.

233. **Variance:** An authorization by the Board of Adjustment for the construction, modification or maintenance of a building or structure in a manner that deviates from dimensional standards (not uses) contained in this ordinance.

* * *

SUBCHAPTER III

SHORELAND ZONING

17.25 INTRODUCTION AND EXPLANATION.

(1) Shoreland zoning applies to all lands in all towns of the County which are within 300' of a river or stream or to the landward edge of the floodplain or within 1000' of a lake, pond or flowage or the St. Croix River. The official County zoning maps show these areas.

(2) Shoreland zoning is required by State law. The Wisconsin Department of Natural Resources exercises supervision over how these regulations are administered or changed.

(3) Owners of shoreland property along the St. Croix, Apple, Kinnickinnic and Willow Rivers should refer also to subchapter IV which contains special rules dealing with the floodplain areas along those rivers.

17.26 GENERAL PROVISIONS.

(1) STATUTORY AUTHORIZATION. Shoreland zoning is adopted pursuant to the authorization contained in §§59.971 and 144.26, Wis. Stats.

(2) FINDING OF FACTS. Uncontrolled use of the shorelands and pollution of the navigable waters of the County adversely affect the public health, safety, convenience and general welfare and impairs the tax base. The State legislature

has delegated responsibility to the counties to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses; and preserve shore cover and natural beauty and this responsibility is hereby recognized by St. Croix County.

(3) STATEMENT OF PURPOSE. This subchapter and related provisions in this chapter and Chs. 15 and 18 have been created for the purpose of promoting and protecting the public health, safety, convenience and general welfare and to:

(a) Further the maintenance of safe and healthful conditions through:

1. Regulating septic tank use, location, installation and operation.

2. Limiting structures to those areas where soil conditions and geologic conditions will provide a safe foundation.

3. Regulating well installation and location.

(b) Prevent and control water pollution through:

1. Requiring setbacks between septic tank and soil absorption systems and watercourses.

2. Establishing minimum lot sizes to provide adequate area for private sewage disposal facilities.

3. Regulating the use of septic tanks and soil absorption systems to protect the public health, safety and general welfare.

4. Requiring alternative methods of sewage disposal where conditions make soil absorption methods unsuitable.

5. Protecting spawning grounds, fish and aquatic life through:

a. Preserving wetlands and other fish and aquatic habitat.

b. Regulating pollution sources.

c. Controlling shoreline alterations, dredging and lagooning.

6. Controlling building sites, placement of structures and land uses through:

a. Separating conflicting land uses.

b. Prohibiting certain uses detrimental to the shoreland area.

c. Setting minimum lot sizes and widths.

d. Regulating side yards and building setbacks from roadways and waterways.

e. Requiring the platting of subdivisions.

7. Preserving shore cover and natural beauty through:

a. Restricting the removal of natural shoreland cover;

b. Preventing shoreline encroachment by structures;

c. Controlling shoreland excavation and other earth moving activities;

d. Regulating the use and placement of boathouses and other structures;

e. Controlling the use and placement of signs.

* * *

SUBCHAPTER III.V, SECTION 17.36 – ST. CROIX COUNTY LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT

A. TITLE, AUTHORITY AND EFFECTIVE DATE

1. TITLE

a. This subchapter shall be cited as the "Lower St. Croix Riverway Overlay District" and hereinafter referred to as the "Riverway District."

2. AUTHORITY

a. This subchapter is enacted pursuant to the authority granted by Wisconsin Statute § 30.27 and Wisconsin Administrative Code NR118.

b. The County Zoning Administrator shall administer this subchapter pursuant to Wisconsin Statute § 59.69.

c. Any mandatory amendments, repeals or recreations to the statutes pertaining to the subject matter of this subchapter are incorporated into this subchapter as of the effective date of amendment, repeal or recreation.

3. **EFFECTIVE DATE**

a. This subchapter shall be effective on July 1, 2005. Ordinance No. 696/(2005) Amendments To Section 17.36, St. Croix River Valley District And Section 17.09, Definitions.

B. PURPOSE

1. **PURPOSE**

a. The purpose of this subchapter is to promote the public health, safety, and general welfare by:

1) Reducing the adverse effects of overcrowding and poorly planned shoreline and bluff area development.

2) Preventing soil erosion and pollution and contamination of surface water and groundwater.

3) Providing sufficient space on lots for sanitary facilities.

4) Minimizing flood damage.

5) Maintaining property values.

6) Preserving and maintaining the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway in a manner consistent with the National Wild and Scenic Rivers Act (P.L. 90-542), the Federal Lower St. Croix River Act of 1972 (P.L. 92-560) and the Wisconsin Lower St. Croix River Act (Wisconsin Statute § 30.27).

* * *

G. GENERAL PROVISIONS

1. Minimum Lot Size

a. The minimum lot size shall be governed by the base-zoning district.

b. Minimum net project area for each lot shall be at least one acre.

c. If the lot is not served by a public sewer or common system, the lot shall have adequate room for one single-family residence and two POWTS.

2. Minimum Lot Width

a. In the rural residential management zone, the minimum lot width shall be 200 feet measured at the building line and at the side of the lot nearest the river.

b. In the conservation management zone, the minimum lot width shall be 250 feet

measured at the building line and at the side of the lot nearest the river.

3. **Density Standards**

   a. There may be no more than one principal structure on each parcel.

4. **Structure Height**

   a. The maximum structure height shall be measured between the average ground elevation and the uppermost point of the structure, excluding chimneys.

      1) The maximum height for principal structures in the rural residential management zone shall be 35 feet.

      2) The maximum height for principal structures in the conservation management zone shall be 25 feet.

      3) The maximum height for accessory structures in both management zones shall be governed by the base-zoning district.

      4) Wireless communication service and other transmission facilities must meet the height requirements in Subchapter VIII of this ordinance.

5. **Structure Setbacks**

   a. On structures existing prior to the effective date of this subchapter, all setbacks shall be measured on a horizontal plane from the foundation of the structure at

the point of the structure that is nearest the Ordinary High Water Mark (OHWM), bluffline, or property line.

1) On modifications or additions to existing structures, roof overhangs shall not encroach within the required setbacks more than three feet, and any cantilevered portions of the structure must meet the required setbacks.

b. On new structures constructed after the effective date of this subchapter, all setbacks shall be measured on a horizontal plane from the roof overhang and any cantilevered portions of the structure at the point of the structure that is nearest the OHWM, bluffline, or property line.

c. All structures except docks, piers, wharves, structural erosion control measures, stairways, and lifts shall meet the following:

1) OHWM Setback: At least 200 feet from the OHWM of the Lower St. Croix River.

2) Bluffline Setback: At least 100 feet from the bluffline in the rural residential management zone, and 200 feet from the bluffline in the conservation management zone.

a) Structures that do not meet the setback may be permitted within the bluffline setback area if they

are set back at least 40 feet from the bluffline and meet all of the following standards:

i. The structure does not protrude above the bluffline as viewed from at or near the mid-line of the river or from 250 feet riverward from the OHWM whichever is less.

ii. The structure is not located in a slope preservation zone.

iii. The structure utilizes building materials that are earth tone in color and of a non-reflective nature, except that windows may be made of ordinary window glass or non-reflective glass, but may not be made of glass designed to reflect more light than ordinary window glass.

iv. The structure is visually inconspicuous.

3) Sideyard Setback: At least 25 feet from all exterior lot lines.

[Summary Of Dimensional Standards Omitted]

H. PERFORMANCE STANDARDS

1. Structure Color

a. All new, expanded, or reconstructed structures shall be earth tone in color.

b. Structures designated as historic buildings on local, State, or national historic registers or located in designated historic districts shall either be earth tone in color or colored appropriate to the period in history for which they are designated.

* * *

3. SLOPE PRESERVATION ZONE

a. No structures, except docks, piers, wharves, structural erosion control measures, stairways, and lifts may be placed in slope preservation zones.

b. Slopes greater than 12 percent may not be altered to become less than 12 percent.

c. No filling or grading is allowed in slope preservation zones that directly face and/or drain directly to the river, except the minimum required for installation of items in a. above.

* * *

I. NONCONFORMING USES AND STRUCTURES AND SUBSTANDARD LOTS

1. NONCONFORMING USES

a. These requirements shall take precedence over general zoning requirements for nonconforming uses in the Riverway District.

b. A nonconforming use may not be expanded or enlarged.

c. An increase in the volume, intensity or frequency of use is allowed if the land area or structure used for the nonconforming use are not expanded or enlarged, and if the owner provides a site plan and photographs of the site to the Zoning Administrator to be kept in a property file at the Planning and Zoning Department.

d. A change from one nonconforming use to another nonconforming use is not allowed.

e. If a nonconforming use is discontinued for a period of 12 consecutive months, any future use of buildings and premises shall conform to all of the requirements of the St. Croix County Zoning Ordinance.

2. **NONCONFORMING PRINCIPAL STRUCTURES**

a. These requirements shall take precedence over general zoning requirements for nonconforming structures in the Riverway District, except where those requirements are more restrictive, in which case the most restrictive requirements shall apply.

b. Ordinary maintenance and repair of a nonconforming principal structure is allowed.

c. Structural alteration, reconstruction and expansion of a nonconforming principal structure and replacement, improvement or structural alteration of the foundation is allowed by a land use permit if all of the applicable requirements in pars. d. and e. below are met.

d. Reconstruction of Nonconforming Principal Structures.

1) Nonconforming principal structures located within the OHWM setback area, bluffline setback area or slope preservation zone may be structurally altered or reconstructed and foundations may be replaced, improved or structurally altered if all of the following requirements are met:

a) The lot has an area of at least 7,000 square feet.

b) The altered or reconstructed structure will be visually inconspicuous or will be rendered so through mitigation per § 17.36 I.5.

c) The structure is altered or reconstructed in the same footprint as the pre-existing structure.

d) The reconstructed structure may not be any taller than the pre-existing nonconforming structure, except that a flat roof may be replaced with a pitched roof,

and may not be taller than allowed per § 17.36 G.4.

e) The color of the structure complies with § 17.36 H.1.

f) The property owner submits a mitigation plan per § 17.36 I.5.

i. If a permit is issued for the reconstruction, the mitigation plan shall be approved, or modified and approved, by the Zoning Administrator.

ii. The mitigation plan shall be incorporated into the permit and the property owner shall be required to implement the mitigation plan as a permit condition.

g) Private on-site wastewater treatment systems are brought into compliance with the requirements of the St. Croix County Sanitary Ordinance.

h) The foundation of the structure may not be replaced, improved or structurally altered, unless all of the following standards are met:

i. It is being done in conjunction with the reconstruction of the structure,

ii. It is entirely located more than 50 feet from the OHWM, and

iii. It is not located in a slope preservation zone.

i) No filling and grading activities are allowed during the alteration or reconstruction, except for the minimum necessary to accomplish the alteration or reconstruction in compliance with other provisions of this subchapter, and as needed to upgrade a private on-site wastewater treatment system, to replace sewer or water laterals, or to install storm water or erosion control measures.

j) If the structure is located in a slope preservation zone, it may be reconstructed on the existing foundation only if WDNR storm water technical standards applicable to steeper sloped areas are implemented to control erosion.

e. Expansion of Nonconforming Principal Structures.

1) Nonconforming principal structures located in the OHWM setback area or bluffline setback area may be expanded and the pre-existing foundation may be replaced, repaired or

structurally altered in conjunction with the expansion if all of the applicable following requirements are met:

a) Structures located wholly or partially within 50 feet of the OHWM may not be expanded.

b) Structures located wholly or partially within a slope preservation zone may not be expanded.

c) Structures entirely set back more than 50 feet from the OHWM but located wholly or partially less than 75 feet from the ordinary high water mark may be expanded **only** if there is no compliant building location available on the lot.

d) Structures entirely set back more than 75 feet from the ordinary high water mark may be expanded regardless of whether a compliant building location exists elsewhere on the lot.

e) The lot has an area of at least 7,000 square feet.

f) The expanded structure will be visually inconspicuous or will be rendered so through mitigation.

g) Any reconstructed portion of the nonconforming structure may

only be reconstructed in the same footprint as the pre-existing structure. Notwithstanding the definition of "reconstruction" in NR 118.03(36), the pre-existing foundation of a structure that is more than 50 feet from the ordinary high water mark and is not within a slope preservation zone may be replaced, repaired or structurally altered in conjunction with the expansion of the structure.

h) For structures located wholly or partially within the OHWM setback area, the total footprint of the structure may not exceed 1500 square feet.

* * *

4. **SUBSTANDARD LOTS**

a. Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

1) The lot is in separate ownership from abutting lands, or

2) The lot by itself or in combination with an adjacent lot or lots under

common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

3) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

* * *

J. ADMINISTRATION

* * *

2. SPECIAL EXCEPTION AND VARIANCE PROCEDURES

a. An application for a special exception permit or variance shall be submitted to the Zoning Administrator upon forms furnished by the County and shall include the following information as outlined in par. b. below.

b. Special exception and variance applications shall supply information adequate for the Board of Adjustment to make a decision based on the type of project to be undertaken. The applicant shall submit to the Zoning Administrator sufficient

copies of the following information for all applications:

1) General information, including but not limited to:

   a) Contact information for property owner, agent, and contractor as applicable.

   b) Legal description of the property and a general description of the proposed use or development.

   c) Information on whether or not a private water or sewage system is to be installed or upgraded.

2) For special exceptions, a detailed written explanation of how the proposed use or development meets the requirements for special exception uses as outlined in § 17.70(7)(a), § 17.36 H. as applicable, and the following standards:

   a) The scenic and recreational qualities of the Riverway District, especially in regard to the view from and use of the river.

   b) The maintenance of safe and healthful standards.

   c) The prevention and control of water pollution, including storm water runoff and sedimentation.

d) The location of the site with respect to floodplains and floodways, slope preservation zones, and blufflines.

e) The erosion potential of the site based upon degree and direction of slope, soil type, and vegetative cover.

f) Potential impact on terrestrial and aquatic habitat.

g) Location of site with respect to existing or future access roads.

h) Adequacy of proposed wastewater treatment.

i) The compatibility of the project with uses on adjacent land.

j) The use of common corridors for locating proposed facilities within or adjacent to public service facilities such as roads, bridges, and transmission services.

3) For variances, a detailed written explanation of how the requested variance meets the requirements for variances as outlined in § 17.70(5)(c)3. of this ordinance.

4) A site plan prepared by a registered land surveyor showing the following information:

a) Property location, boundaries, and dimensions.

b) Location of all existing and proposed structures and impervious surfaces with distances measured from the lot lines and centerline of all abutting streets or highways.

c) Contours on an established datum at vertical intervals of not more than two feet.

d) Blufflines, slope preservation zones, OHWM, floodway and flood fringe boundaries, and all applicable setbacks.

e) Adjoining land and water-oriented uses.

f) The location and description of existing and proposed alterations of vegetation, topography, and drainage, including grading limits and vegetation removal and replacement.

5) A recent aerial photo with property lines drawn in, showing the location of existing and proposed structures, including height and setback dimensions.

6) A mitigation plan, if required.

7) Photos of the site taken from the river slightly upstream and downstream of the property, and directly offshore.

* * *

SUBCHAPTER IV, SECTION 17.40
ST. CROIX COUNTY FLOODPLAIN OVERLAY DISTRICT

A. GENERAL PROVISIONS

1. TITLE

a. This subchapter shall be cited as the "St. Croix County Floodplain Overlay District" and is herein after referred to as the Floodplain District.

2. AUTHORITY

a. The provisions of the Floodplain District are authorized by Wisconsin Statutes §§ 59.69, 59.692, 59.694 and 87.30 and Wisconsin Administrative Code Chapter NR116 (NR 116).

b. Any mandatory amendments or repeals or recreations to the statutes pertaining to the subject matter of this ordinance are incorporated into this ordinance as of the effective date of amendment, repeal or recreation.

3. EFFECTIVE DATE

a. This ordinance shall be effective on September 30, 2005. Ordinance No. 711/(2005).

4. FINDINGS OF FACT

a. The St. Croix County Board of Supervisors finds that the uncontrolled use of the floodplain adversely affects the public health, safety, convenience, general welfare, land values and tax base of St. Croix County.

b. In addition, substantial public expenditures may be required for the protection, rescue and relief of persons and property in areas subject to periodic flooding.

c. Uncontrolled filling and construction have been determined to be the major causes of adverse effects.

d. The effects of a single fill or other single project upon flood heights, velocities, or floodplain storage areas may be relatively insignificant, but the combined effects of a number of such projects may drastically increase the potential for injury or damage from flooding. Without a thorough analysis of proposed development it is not possible to adequately assess impacts.

5. PURPOSE

a. The purpose of this ordinance is to promote and protect public health, environment, safety and general welfare and to further the maintenance of safe and healthful conditions for the people and communities within the County.

b. Protect life, health and property.

c. Minimize expenditures of public funds for flood control projects.

d. Minimize development in a floodplain which would obstruct flood flows and decrease the storage capacity of the floodplain.

e. Minimize rescue and relief efforts undertaken at the expense of the taxpayers.

f. Minimize business interruptions and other economic disruptions.

g. Minimize damage to public facilities.

h. Broadening the property tax base of the County by enhancing property values.

i. Discourage the victimization of unwary home and land buyers.

j. Prevent conflicts between neighbors.

k. Minimize the occurrence of future flood blight areas in the floodplain.

l. Prevent increases in flood heights that could increase flood damage and result in conflicts between property owners.

m. Discourage development in a floodplain if there is any practicable alternative to locate the activity, use or structure outside of the floodplain.

* * *

SUBCHAPTER VII

ADMINISTRATION AND ENFORCEMENT

17.70 ADMINISTRATION.

* * *

(5) BOARD OF ADJUSTMENT.

* * *

(c) Powers and Duties. The Board of Adjustment shall:

1. Adopt such rules as it considers desirable for the conduct of business, subject to the provisions of this section and relevant State Statutes.

2. Hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement or administration of this chapter. All such appeals shall be governed by the provisions of sub. (6).

3. Grant variances from the strict terms of this chapter as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the chapter will result in unnecessary hardship so that the spirit of the chapter shall be observed and substantial justice done. Variances shall be granted only subject to the provisions of sub. (6). No variance shall have the effect of allowing in any district uses not permitted in that district.

* * *

(6) PROCEDURES.

* * *

(c) Hearings on Appeals, Variances, Special Exceptions. Upon the filing with the Board of an appeal from a decision of the Zoning Administrator or deputy administrator, an application for a special exception or a variance, the Board shall hold a public hearing. The Board shall fix a reasonable time for the hearing and publish a Class 2 notice under Ch. 985, Wis. Stats., as well as giving due notice by mail to all the parties in interest. When the matter concerns the shoreland or floodplain regulations the Board shall submit to the Department of Natural Resources a copy of the notice and application for the proposed variance or special exception sufficiently in advance so that the Department of Natural Resources will receive at least 10 days notice of the hearing. At the hearing any party may appear in person or by agent or attorney and present written and oral evidence for the record.

(d) Decisions on Appeals, Variances or Special Exceptions. The Board shall arrive at a decision on such appeal, special exception or variance within a reasonable time. In passing upon an appeal the Board may, so long as such action is in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or modify the

order, requirement, decision or determination appealed from and it shall make its decision in writing setting forth the findings of fact and the reasons for its decision. A copy of all decisions granting variances or special exceptions affecting any provision of the shoreland or floodplain regulations shall be forwarded to the Department of Natural Resources within 10 days of such action.

(e) A variance shall not:

1. Grant, extend or increase any use prohibited in the zoning district.

2. Be granted for a hardship based solely on an economic gain or loss.

3. Be granted for a hardship which is self-created.

4. Damage the rights or property values of other persons in the area.

5. Allow actions without the appropriate amendments to this ordinance or its associated map(s)

6. Allow any alteration of an historic structure, including its use, which would preclude its continued designation as an historic structure.

(f) Conditions Attached to Variances. In granting a variance, the Board of Adjustment may prescribe appropriate conditions and safeguards which are in conformity with the purposes of this

chapter. Violations of such conditions and safeguards when made a part of the terms under which the variance is granted shall be deemed a violation of this chapter.

APPENDIX D

St. Croix County Zoning Ordinance
St. Croix River Valley District
As Enacted June 19, 1975

* * *

3.10.8 Pre-existing parcels Parcels of record in the Register of Deeds Office on the effective date of this Ordinance which do not allow the project to meet the standards of sec. 3.10 may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant and provided that the setback from bluffline, which must be set by the Board, will not be reduced to less than 40 feet and that all buildings will be setback at least 75 feet, from normal high water elevation, that the proposed use complies with flood-plain zoning and sanitary standards, and that a minimum net project area of (1) acre per dwelling unit is provided on the site. The Board may modify the minimum bluffline setback line and the net project area specified above upon a finding that the proposed building will not be visually conspicuous from the waterlevel in the channel of the St. Croix River under summer vegetative conditions.

* * *

St. Croix County Zoning Ordinance
St. Croix River Valley District (September 1978)

* * *

3.12 St. Croix River Valley District

H. Pre-Existing Parcels.

1. Parcels of record in the Register of Deeds Office on the effective date of this Ordinance which do not allow the project to meet the standards of Section 3.12 may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant and provided that the setback from bluffline, which must be set by the Board, will not be reduced to less than forty (40) feet and that from all buildings will be set back at least 75 feet from normal high water elevation, that the proposed use complies with flood plain zoning and sanitary standards, and that a minimum net project area of one acre per dwelling unit is provided on the site. The Board may modify the minimum bluff line setback line and the net project area specified above upon a finding that the proposed building will not be visually conspicuous from the water level in the channel of the St. Croix River under summer vegetative conditions.

2. Justification for a reduced setback shall be based on limitations imposed by the physical characteristics of the property, not on the economic or other conditions of the applicant.

* * *

St. Croix County Zoning Ordinance
St. Croix River Valley District (October 1986)

* * *

17.36 St. Croix River Valley District

* * *

(5) PERFORMANCE STANDARDS. No structure, land, or water shall hereafter be used except in compliance with the general provisions of this Chapter and with the following performance standards:

* * *

(n) Substandard Lots. Lots of record in the Register of Deeds office on January 1, 1976, or the date of enactment of an amendment to this section, which do not meet the requirements of §NR 118.06, Wis. Adm. Code, may be allowed as building sites provided that:

1. The lot is in separate ownership from abutting lands or, if lots in an existing subdivision are in common ownership, each of the lots has at least one acre of net project area.

2. The proposed use conforms to the requirements of these rules and any underlying zoning or sanitary code requirements.

* * *

APPENDIX E

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2008-AP-2728

Donna J. Murr

Petitioner-appellant-cross respondent,

v.

St. Croix County Board of Adjustment,

Respondent-respondent-cross appellant,

and

State of Wisconsin,

Appellate intervenor-respondent-cross appellant.

BRIEF OF PETITIONER-APPELLANT-CROSS RESPONDENT DONNA J. MURR

(Filed October 30, 2009)

An appeal from an order of the Circuit
Court of St. Croix County,
Honorable Edward F. Vlack

MUDGE PORTER LUNDEEN & SEGUIN, S.C.
Attorneys for Petitioner-appellant-cross respondent

BY: R. Michael Waterman
State Bar No. 1025674

110 Second Street
P.O. Box 469
Hudson, WI 54016
(715) 386-3200

* * *

ARGUMENT

THE BOARD OF ADJUSTMENT ERRED – THE COUNTY ORDINANCE DOES NOT RESTRICT THE SALE OR DEVELOPMENT OF THE VACANT LOT.

The Murrs own two adjacent lots. One lot contains the summer home/cabin, and the other is vacant. The lots had separate owners when the ordinance was enacted. (R. 3 – hearing exhibit 4; R. 31 – BOA transcript pp. 36, 40). Each lot is now considered a "substandard lot" under the Lower St. Croix Riverway Ordinances because they each has less than one acre of net project area. (R. 31 – BOA transcript p. 4). The Murrs have considered selling the adjacent, vacant property, and they have considered developing the lot for themselves. They have been prevented from doing so because of ordinance language that restricts adjoining substandard lots in common ownership. The Murrs filed an application for a variance, but it may be better characterized as an appeal of the zoning office's interpretation. The Murrs do not believe the ordinance restricts their use of the lot. (R. 3 – BOA hearing exhibit 2, application materials; R. 31 – BOA transcript p. 3).

* * *

The St. Croix Cove Subdivision, and hence the Murrs' lots, were created in the 1950s. (R. 3 – BOA hearing exhibit 1, Staff Report p. 2). The record contains undisputed evidence that the lots did not have common owners until sometime after January 1, 1976, the determinative date set forth in the ordinance. The April 12, 2005 email from Attorney Kenneth Rohlf, which was received by the Board as Exhibit 4, showed that William and Margaret Murr acquired Parcel B in 1960. In 1961, they transferred title to William Murr Plumbing, Inc. In 1963, William and Margaret Murr acquired the vacant Parcel A. (R. 3 – BOA hearing exhibit 4; *see also* R. 31 – BOA transcript p. 40).

Parcel A was titled in the Murrs' parents and Parcel B was titled in a corporation for decades.[1] In 1994 Parcel B was transferred to the Murr children. In 1995, Parcel A was transferred to them. (R. 31 – BOA hearing exhibit 1, Staff Report p. 2).

* * *

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court concerning the Board's enforcement and application of Ordinance section 17.36(I) (4).

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[1] For the sake of full disclosure, Parcel B was transferred from William Murr Plumbing, Inc. back to William and Margaret Murr in 1982. That transfer was not detailed at the board of adjustment hearing, and appellants share this information out of candor to the court. This transaction does not affect the Murrs' arguments or resolution of this issue.

Dated:_____

MUDGE, PORTER, LUNDEEN & SEGUIN, S.C.
Attorneys for petitioner-appellant-cross respondent

_____
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APPENDIX F

St. Croix County Board of Adjustment
Hearing Date: March 23, 2006
APPLICATION #5; Special Exception & Variances

Applicant:	Donna Murr (Et Al), property owners
Site Address:	202 Cove Court, River Falls, WI 54022
Property #s:	24.28.20.611G, 24.28.20.611 G-1
Computer #s:	040-1155-80-000, 040-1155-85-000
Location:	Part of Government Lot 2 in Section 24, T28N, R20W, Town of Troy
Zoning:	Ag Residential District and Lower St. Croix Riverway District
Lot Sizes:	2.52 acres total
Requests:	**Item #1:** Variance to use two contiguous substandard lots in common ownership in the Lower St. Croix Riverway District as separate building sites and reconfigure the lot lines pursuant to Section 17.36 I.4.a.1-3 of the St. Croix County Zoning Ordinance.
	Item #2: Variance to reconstruct and expand a nonconforming principal structure without using the same footprint as the original structure in the Lower St. Croix Riverway District pursuant to Section 17.36 1.2.e.1(g) of the St. Croix County Zoning Ordinance.
	Item #3: Variance to the 15-foot floodfringe fill standard in the Floodplain District pursuant to Section 17.40

G.3.B.1 of the St. Croix County Zoning Ordinance.

Item #4: Variance to construct retaining walls and stairs that encroach within the 200' OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

Item #5: Special exception request for filling and grading in excess of 2000 square feet in the Shoreland District pursuant to Section 17.29(2)(c)3 of the St. Croix County Zoning Ordinance.

Item #6: Variance to reconstruct a concrete patio (a nonconforming accessory structure) in the Lower St. Croix Riverway District pursuant to Section 17.36 I.3.b of the St. Croix County Zoning Ordinance.

Item #7: Variance to construct a deck within the 200' OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

Exhibits:

1) Staff Report

2) Applications for Special Exception and Variances with Supporting Materials

3) Photos

4) E-mail from Alex Blackburn, April 12, 2005

5) Revised Survey Maps from Jon Sonnentag, dated March 10, 2006

6) E-mail from the Town of Troy, dated March 10, 2006

7) Letter from the Land and Water Conservation Department, dated March 14, 2006

8) Letter from the Wisconsin Department of Natural Resources, dated March 14, 2006

9) Correspondence between staff and the applicants, December 2004-March 2006

10) Storm Water Management Plan, submitted March 14, 2006

BACKGROUND:

The applicants currently own a nonconforming principal structure on two contiguous substandard lots within the Shoreland, Lower St. Croix Riverway, and Floodplain overlay districts in the Town of Troy. The applicants' parents purchased the lots and one small parcel with a boathouse on it in 1960, 1963, and 1965 (Exhibit 4) and ownership was transferred to their five children in 1995. The children would now like to use the lots as two separate building sites and wish to reconfigure the lot lines in a manner that establishes one

lot with the current home site on the beach (Lot 1) and another lot above the bluff (Lot 2) that could potentially be sold and developed in the future. The Lower St. Croix Riverway District prohibits the sale and/or development of contiguous substandard lots in common ownership unless each lot has at least one acre of net project area. The applicants are applying for a variance to these standards **(Item #1)**. As the lots exist today, they have a combined total of less than one acre of net project area, the majority of which is above the bluffline. The proposed reconfiguration would result in one lot (Lot 1) almost entirely within the floodplain or slope preservation zone, with less than a quarter acre of net project area, none of which is buildable. A summary of the lot reconfiguration follows (please see Exhibit 5 for drawings of all existing and proposed lots):

	Total Acres	**Total NPA**
Existing Parcel A	1.27	~0.50
Existing Parcel B	1.25	~0.48
Proposed Lot 1	1.26	~0.24
Proposed Lot 2	1.26	~0.72

As part of the request, the applicants also wish to tear down the existing nonconforming principal structure on the beach and reconstruct and expand it to a total footprint of 1402 square feet. The existing home has a footprint of 750 square feet and is located 86 feet from the OHWM of the St. Croix River. The proposed reconstruction and expansion meets all of the requirements in the Riverway District, except that the reconstructed portion will not be in the same footprint as the existing

structure (Exhibit 2, Proposed Grading Plan). The applicants are requesting a variance to use approximately 70 percent of the existing structure's footprint **(Item #2)**. The closest point of the new footprint to the river will be several feet back from the closest point of the existing footprint and will extend an additional 15 feet to the west and slightly into the slope preservation behind the house, which is not allowed in the Riverway District. Landward expansion is not possible due to the presence of an existing well, steep slopes, and a private drive behind the home. The applicants plan to install a holding tank for their sanitary system since the entire home site is either within the floodplain or slope preservation zone.

The existing home is also located entirely within the floodplain and the lowest floor of the home is approximately six feet below the required flood protection elevation. Because the home is located in the floodplain, specifically the "floodfringe", the new home will have to be elevated on 5-6 feet of fill to bring it above the flood protection elevation for a distance of 15 feet from the foundation in all directions as required in the Floodplain District. Due to the natural characteristics and layout of the site, specifically the presence of mature trees that would have to be removed and the close proximity of the home to the administrative floodway and adjacent property lines, the applicants cannot extend the fill out this far and are requesting a variance to the fill standard **(Item #3)**. The applicants have submitted a hydraulic study prepared by an engineer indicating that the proposed amount of fill encroaching

within the administrative floodway boundary will not cause an increase to the regional flood elevation. To hold the fill in place, the applicants are proposing to construct retaining walls that will encroach within the OHWM setback, which requires another variance in the Riverway District **(Item #4)**. The applicants also need a special exception permit for filling and grading a total area of approximately 6600 square feet in the Shoreland District **(Item #5)**. Because the fill will extend into the slope preservation zone behind the existing home, the applicants technically need another variance for filling and grading on a slope preservation zone, as well as a special exception permit for filling and grading within 40 feet of a slope preservation zone in the Riverway District, which they will apply for next month pending approval of their project.

The applicants wish to reconstruct a patio that will be buried by the fill and are requesting a variance for this **(Item #6)**. The new patio will be smaller than the existing patio and will be located above the second-tier of retaining walls. The existing patio is approximately 975 square feet, and the new patio will be approximately half of this size. Part of the patio will extend over the footprint of the existing home. As part of the plans, the applicants are also proposing to construct a deck on the riverward side of the new home that will encroach within the OHWM setback **(Item #7)**. The deck will be approximately 150 square feet and will be constructed within the footprint of the existing home.

The applicants have been meeting with staff for over a year to explore different options that would meet their

goals while also meeting the standards and requirements of the Shoreland, Floodplain, and Lower St. Croix Riverway overlay districts. The applicants' goals include:

1. Reconstructing the home out of the floodplain to reduce flood damage,
2. Saving as many trees on the site as possible,
3. Making the home as inconspicuous from the river as possible,
4. Providing a safe, clean and mold-free living environment for their family, and
5. Keeping the river clean.

Staff has presented the following options that meet all of these goals and would not require any variances:

1. Tearing down the existing home and building a new home on top of the bluff, which would meet all of the applicants' goals as well as all required setbacks. The applicants did not wish to pursue this alternative because they prefer to keep their home on the beach and hope to be able to reconfigure their lot lines and sell the building site above the bluff as a separate lot.
2. Improvements to the existing home as allowed in the Riverway District, provided the improvements are kept under 50 percent of its present equalized assessed value as allowed in the Floodplain District. As part of this alternative, the applicants would be able to exclude the costs of flood proofing the lowest

floor of their existing home. The applicants did not wish to pursue this alternative because they would not be able to add a second story to the home to make up for the lost living space. They also felt that this was not a practical alternative due to damage and mold caused by past flooding that may require more extensive improvements.

Staff informed the applicants that, if other alternatives were available to them that would not require variances, they would have a difficult time demonstrating a hardship (Exhibit 9). During these meetings, staff also informed the applicants that they would not be able to use or sell their substandard lots as separate building sites or reconfigure them as they wished since such use of substandard lots is prohibited in the Riverway District and would thus constitute a "use" variance.

GOVERNMENTAL AGENCY REVIEW:

Town of Troy: A Town representative joined staff on the site visit. The Town is in the process of reviewing the application under the terms of its Riverway Ordinance. The Town does not plan to submit comments (Exhibit 6).

St. Croix County Land and Water Conservation Department: Steve Olson has reviewed the plans and visited the site, and recommends denial of the variances and special exception permit. He will be available at the hearing to answer questions (Exhibit 7).

Wisconsin Department of Natural Resources: Eunice Post and Gary Lepak have reviewed the plans and visited the site, and recommend denial of the variances and special exception permit. They will be available at the hearing to answer questions (Exhibit 8).

Federal Emergency Management Agency: Tira Miller and Dave Schein have spoken with staff about this project and received copies of the application for their review. They have not yet submitted comments.

SITE REVIEW:

The properties adjacent to this site are zoned Ag Residential and are in the Lower St. Croix Riverway, Shoreland and Floodplain overlay districts. They feature predominantly seasonal and year-round residential development, as well as some open space on a large undeveloped parcel to the west. At least five other property owners along Cove Road own two contiguous substandard lots.

STAFF SUMMARY:

Item #1: Section 17.36 I.4.a.1-3 of the Ordinance states that lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to the Riverway District that makes the lot substandard, which do not meet the requirements of the district, may be allowed as building sites provided that the following criteria are met:

1. The lot is in separate ownership from abutting lands, or

2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

3. All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

Item #2: Section 17.36 I.2.e.1(g) of the Ordinance states that any reconstructed portion of a nonconforming principal structure in the Riverway District may only be reconstructed in the same footprint as the preexisting structure.

Item #3: Section 17.40 G.3.B.1 of the Ordinance states that any habitable structure in the Floodplain District which is to be erected, constructed, reconstructed, altered, or moved into the floodfringe area for residential use, shall meet or exceed the following standards:

> The elevation of the lowest floor, excluding the basement or crawlway, shall be 2 feet or more above the regional flood elevation on fill. The fill shall be one foot or more above the regional flood elevation extending at least 15 feet beyond the limits of the structure. Other flood proofing

measures may be approved if the elevations of existing streets or sewer lines makes compliance impractical and the Board of Adjustment grants a variance consistent with flood proofing standards in Section 17.40 D.5 of the Ordinance.

Items #4 and #7: Section 17.36 G.5.c.1 of the Ordinance states that all structures in the Riverway District must be at least 200 feet from the OHWM of the Lower St. Croix River.

Item #5: Section 17.29(2)(c)3 of the Ordinance requires a special exception permit for filling and grading in excess of 2000 square feet in the Shoreland District.

Item #6: Section 17.36 I.3.b of the Ordinance states that nonconforming accessory structures, other than sheds or garages, may not be structurally altered, reconstructed or expanded. Patios, whether pervious or impervious, are defined as "at-grade" accessory structures pursuant to Section 17.09 of the Ordinance.

Section 17.36 1.5 of the Ordinance requires an erosion and sediment control plan, storm water management plan, and vegetation management plan as mitigation for reconstruction or expansion of nonconforming structures in the Riverway District.

Variance Criteria

The Board of Adjustment has the authority to issue a variance only when the Ordinance and statutory criteria are satisfied. Those criteria are prescribed by the St. Croix County Zoning Ordinance, Sections 17.70(5)(c)3 and 17.70(6)(e) and Wisconsin State Statutes Section 59.694 as follows:

> Section 17.70(5)(c)3: Grant variances from the strict terms of this chapter as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the chapter will result in unnecessary hardship so that the spirit of the chapter shall be observed and substantial justice done. Variances shall be granted only subject to the provisions Sub (6). No variance shall have the effect of allowing in any district uses not permitted in that district.
>
> Section 17.70(6)(e): A variance shall not:
>
> 1. Grant, extend or increase any use prohibited in the zoning district.
> 2. Be granted for a hardship based solely on an economic gain or loss.
> 3. Be granted for a hardship which is self-created.
> 4. Damage the rights or property values of other persons in the area.
> 5. Allow actions without the appropriate amendments to this ordinance or its associated map(s).

6. Allow any alteration of an historic structure, including its use, which would preclude its continued designation as an historic structure.

Section 59.694(7)(c): To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Section 17.40 I.6 of the St. Croix County Zoning Ordinance further requires that the Board of Adjustment may, upon appeal, grant a variance from the standards in the Floodplain District if the following criteria are met:

1. Literal enforcement of the ordinance provisions will cause unnecessary hardship.

2. The hardship is due to adoption of the floodplain ordinance and unique property conditions, not common to adjacent lots or premises. In such case the ordinance or map must be amended.

3. The variance is not contrary to the public interest.

4. The variance is consistent with the purpose of this Ordinance.

Special Exception Standards

Section 17.70(7)(a) of the Ordinance stipulates that the Board of Adjustment shall only grant special exceptions subject to the following provisions:

1. No granting of a special exception shall violate the spirit or general intent of this Chapter.

2. No special exception shall be allowed which would be contrary to the public health, safety, or general welfare or which would be substantially adverse to property values in the neighborhood affected.

3. No use shall be permitted by special exception that would constitute a nuisance by reason of noise, dust, smoke, odor, or other similar factors.

4. The Board shall also apply standards set forth in other sections of this Chapter, which apply to particular classes of special exceptions.

Additionally, Section 17.70(7)(c) stipulates that the Board of Adjustment shall not approve a special exception in the Shoreland District without specific consideration of the following items:

1. The maintenance of safe and healthful standards.

2. The prevention and control of water pollution including sedimentation.

3. Existing topographic and drainage features and vegetative cover on the site.

4. The location of the site with respect to floodplains and floodways of rivers and streams.

5. The erosion potential of the site based upon degree and direction of slope, soil type and vegetative cover.

6. The location of the site with respect to existing or future access to roads.

7. The need of the proposed use for shoreland location.

8. Its compatibility with uses on adjacent land.

9. The amount of liquid wastes to be generated and the adequacy of the proposed disposal systems.

10. Locational factors under which:

    a. Domestic uses shall be generally preferred.

    b. Uses not inherently a source of pollution shall be preferred over uses that are or may be a pollution source.

    c. Use locations within an area tending to minimize the possibility of pollution shall be preferred over use locations tending to increase the possibility.

Section 17.36 J.2.b)2) states that special exception uses in the Lower St. Croix Riverway District must take into account the following standards in addition to those listed for the Shoreland District (as applicable):

- The scenic and recreational qualities of the Riverway District, especially in regard to the view from and use of the river (Section 17.36 J.2.b)2)a)).
- Potential impact on aquatic and terrestrial habitat (Section 17.36 J.2.b)2)f)).

Regarding filling and grading, Section 17.29(5) of the Ordinance states that the Board of Adjustment may attach the following conditions to a special exception permit as applicable:

(a) The smallest amount of bare ground be exposed for as short a time as possible.

(b) Temporary ground cover such as mulch be used and permanent such as sod be planted.

(c) Diversions, silt basins, terraces and other methods to trap sediments be used.

(d) Fill be stabilized according to accepted engineering standards.

Board of Adjustment Direction

The Board of Adjustment, after contemplating all relevant information, may do one of the following:

1. Recommend approval of the request.
2. Recommend denial of the request.
3. Table/postpone the decision to absorb information gathered or request additional information.

The Board of Adjustment must stipulate findings to support their variance and special exception decisions (for approval or denial).

STAFF FINDINGS AND CONCLUSIONS OF LAW:

General Findings:

Staff offers the following findings and conclusions of law pertinent to the special exception and variance requests for the Board's consideration:

1. The applicant is Donna Murr (Et Al) [sic], property owners, 8897 Campton Drive, Inver Grove Heights, MN 55076.

2. The address of the site is 202 Cove Road, River Falls, WI 54022.

3. The site is located in part of Gov. Lot 2, Section 24, T28N, R20W, Town of Troy, St. Croix County, WI.

4 The Land & Water Conservation Department recommends denial of the project in its entirety.

5. The Wisconsin Department of Natural Resources recommends denial of the project in its entirety due to lack of a demonstrated hardship and failure to meet the spirit and intent of the Ordinance.

Item #1 (Substandard Lot) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #1 for the Board's consideration:

6. The applicants filed an application with the Board of Adjustment for a variance to use two contiguous substandard lots in common ownership in the Lower St. Croix Riverway District as separate building sites and reconfigure the lot lines.

7. Denying this variance would not deprive the applicants of reasonable use of their property because their contiguous substandard lots can be developed and sold jointly as a single, more conforming parcel that is more suitable for residential development.

8. Granting this variance would allow a use that is prohibited in the Lower St. Croix Riverway District; specifically, the use of two contiguous substandard lots in common ownership as separate building sites.

9. Granting this variance would not meet the spirit and intent of the Lower St. Croix Riverway District, which limits the use of substandard lots for the purpose of reducing the adverse affects of overcrowding and poorly planned shoreline and bluff area development. Other purposes of the Lower St. Croix Riverway District that would not be met by granting this variance include preventing soil erosion and pollution and contamination of surface water and ground water; providing

sufficient space on lots for sanitary facilities; minimizing flood damage; maintaining property values; and preserving and maintaining the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway in a manner consistent with the National Wild and Scenic Rivers Act and the Federal and Wisconsin Lower St. Croix River Acts.

10. Granting this variance is not consistent with the National Wild and Scenic Rivers Act, which was created to protect rivers, including the Lower St. Croix River, that, "*with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, and other similar values, and shall be preserved in free-flowing condition, and protected for the benefit and enjoyment of present and future generations*".

11. The fact that the applicants have paid property taxes on both lots and may wish to sell one of the lots in the future does not constitute a hardship, which cannot be based solely on an economic gain or loss.

12. The applicants' lots, either separate or combined, do not have one acre of net project area, which is a requirement outlined in the County Ordinance and in Wisconsin State Administrative Code NR 118, from which the County cannot be less restrictive. Furthermore, the proposed reconfiguration of the existing lots would result in a self-created hardship on Lot

1, which will have no building envelope and will require a variance to build on.

13. The application of these standards in the Ordinance is not unique to this property since they apply to all substandard lots within the Riverway District, not just the applicants'. Thus, a variance is not necessary to secure to the applicants similar rights to neighboring landowners (some of whom own contiguous adjacent substandard lots and some of whom don't) since all landowners in the Riverway District are subject to the same rules and regulations.

14. Denying this variance will not damage the rights or property values of other persons in the area since they are subject to the same rules and regulations as the applicants. The rules and regulations are intended to protect existing property owners and the general public from the adverse affects of overcrowding and poorly planned development in the Riverway District.

Item #2 (Reconstruction and Expansion Outside of Footprint) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #2 for the Board's consideration:

15. The applicants filed an application with the Board of Adjustment for a variance to reconstruct and expand a nonconforming principal structure without using the same footprint as

the original structure in the Lower St. Croix Riverway District.

16. The applicants have not demonstrated an unnecessary hardship since they could feasibly use the same footprint as the existing structure for the reconstructed portion of the home. Furthermore, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building that meets the requirements of all applicable overlay districts.

17. The applicants are not requesting minimal relief since approximately 30 percent of the new footprint will be outside of the existing footprint.

18. Granting this variance would not meet the spirit and intent of the St. Croix Riverway District, the intent of which is to allow property owners to rebuild what they have in the same footprint with reasonable expansion needed, and at the same time reduce the adverse impacts of existing, poorly planned development. Even though the proposed new footprint would be further back from the river than the original, it would require more filling and grading and tree removal in the sensitive shoreline area than using the original footprint because it is being moved and extended further west (parallel to the river) and a patio and deck are proposed over the remaining riverward portion of the original footprint

(Items #6 and #7). The proposed footprint also extends into the slope preservation zone, which is prohibited. Thus, adverse impacts will increase, not be reduced, and will negatively affect the scenic and natural characteristics of the water and related land of the river.

19. The Ordinance limits filling and grading associated with reconstructing or altering a nonconforming principal structure to only the minimum necessary to accomplish the reconstruction or alteration in compliance with other provisions of the Riverway District. Moving the footprint is not in compliance with the provisions of the Riverway District and will require additional filling and grading. Also, the extensive filling and grading required to elevate the home on fill to meet floodfringe standards will increase the negative environmental and visual impacts on the river.

Item #3 (Floodplain Fill) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #3 for the Board's consideration:

20. The applicants filed an application with the Board of Adjustment for a variance to the 15-foot flood fringe fill standard in the Floodplain District in order to elevate their home on fill extending out from the foundation to a distance of less than 15 feet.

21. The elevation of existing streets or sewer lines (the applicants have a private on-site wastewater treatment system) does not make compliance with the fill requirements impractical; rather, it is the existence of trees, the close proximity of the administrative floodway boundary, and the close proximity of neighboring property lines that makes compliance impractical.

22. The request does not meet all of the criteria for granting a variance. This request meets the spirit and intent of the Ordinance by elevating the home above the RFE without causing any increase in the regional flood elevation (RFE) as indicated by the hydraulic study submitted by the applicants, and will provide minimal relief to the floodplain standards. However, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building above the RFE. The applicants also have the option of keeping their existing home in its current location and floodproofing and improving it to a value not to exceed 50 percent of its present equalized assessed value.

Item #4 (Retaining Walls and Stairs in the OHWM Setback) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #4 for the Board's consideration:

23. The applicants filed an application with the Board of Adjustment for a variance to construct retaining walls with stairs that encroach within the 200' OHWM setback in the Lower St. Croix Riverway District for the purpose of holding back fill.

24. The applicants are not requesting minimal relief since the retaining walls and stairs will encroach approximately 125 feet into the required OHWM setback. The walls could feasibly encroach less, with the foundation of the house essentially serving as part of the retaining wall.

25. Literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new [sic] above the RFE that will not need fill held back by retaining walls and that better meets the spirit and intent of the Riverway District. Personal preference to keep the home on the beach does not constitute a hardship.

26. Granting this variance would not meet the spirit and intent of the Ordinance since it would allow for more visible structural encroachment closer to the OWHM setback than what currently exists on the site, and would dramatically alter the natural appearance and ecology of the shoreline.

27. It is not known whether or not the retaining walls will be designed to withstand flood pressures, depths, velocities, uplift, and impact

forces, and other regional flood factors as required for all structures in the Floodplain District. Improper design could potentially lead to greater negative environmental impacts and flood damage, which would not be in the public interest.

Item #5 (Grading and Filling in the Shoreland) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #5 for the Board's consideration:

28. The applicants filed a special exception request for filling and grading in excess of 2000 square feet in the Shoreland District in order to elevate their new home on fill as required in the Floodplain District.

29. Granting this special exception would violate the spirit and intent of the Shoreland and Riverway Districts since the amount of fill would substantially increase the ground elevation close to the OHWM. This will dramatically change the topography, drainage, natural appearance, and ecology of the shoreline. It will also require the removal of several mature trees within the OHWM setback and could lead to damage of the remaining trees from excavating and construction activities, as well as a reduction of terrestrial shoreland habitat. Finally, the end result of bringing in so much fill will be a structure that, while elevated to meet the floodplain standards, is much higher and more visible from the river

than what currently exists, thus detracting from the scenic and recreational value of the Lower St. Croix River Valley.

30. Granting this special exception permit would be contrary to the public health, safety, and general welfare and potentially be adverse to property values in the neighborhood affected. While the hydraulic analysis submitted by the applicants indicates that the fill extending into the administrative floodplain boundary will not increase the RFE, it still has the potential to reduce the storage capacity of the floodplain (particularly when considering the cumulative impact of numerous fill projects in the floodplain of the river) and could potentially lead to increased flood damage on properties upstream and downstream.

Item #6 (Reconstructing a Nonconforming Patio) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #6 for the Board's consideration:

31. The applicants filed an application with the Board of Adjustment for a variance to reconstruct an accessory concrete patio that encroaches within the 200' OHWM setback in the Lower St. Croix Riverway District.

32. The request does not meet all of the criteria for granting a variance. With conditions for storm water management and landscaping, the patio could meet the spirit and intent of the Ordinance in that it would not be visible

from the river, would not lead to an increase in storm water runoff, and would encroach less than the existing patio. However, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building and patio that meets the requirements of all applicable overlay districts and better meets the spirit and intent of the Ordinance.

Item #7 (Deck in the OHWM Setback) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #7 for the Board's consideration:

33. The applicants filed an application with the Board of Adjustment for a variance to construct a deck within the 200' OHWM setback in the Lower St. Croix Riverway District.

34. The request does not meet all of the criteria for granting a variance. With conditions for vegetative screening, the deck would meet the spirit and intent of the Ordinance in that it could be made visually inconspicuous and would not lead to an increase in storm water runoff, and would encroach no more than the existing home. However, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building

with an attached deck that meets the requirements of all applicable overlay districts and better meets the spirit and intent of the Ordinance.

STAFF RECOMMENDATION:

Based on these findings of fact and conclusions of law, staff recommends denial of the entire project (Items #1-#7). The applicants' property falls within three overlay districts: Shoreland, Floodplain, and Lower St. Croix Riverway. While some components of the applicants' request may be allowed as proposed in one district, the project in its entirety cannot meet the standards in all three districts. In fact, compliance with standards in one district (particularly the Floodplain District) results in noncompliance with standards in the other districts. While the applicants' desire to develop two lots and reconstruct a larger home on the beach is very understandable, doing so would not minimize the impacts of the development as it exists today; but rather would result in additional development and extensive alterations close to the shoreline in a very sensitive and protected area, the St. Croix River Valley. The cumulative impacts to the scenic and natural characteristics of this outstanding public resource are simply too great.

In the event that the Board of Adjustment makes findings of fact and conclusions of law that support approval of any or all of these requests, staff recommends the following conditions for your consideration:

1. Approval for these variances and special exception permits does not include any filling, grading, vegetation removal, development, or other activities not indicated in the application and plans submitted on February 6, 2006.

2. Prior to commencing construction, the applicants shall secure necessary permits from the Town of Troy and obtain any other required local, State, or Federal permits and approvals, including but not limited to a County Sanitary Permit, a Wisconsin Department of Natural Resources Chapter 30 Permit, and Army Corps of Engineering approval (if applicable).

3. Prior to commencing construction, the applicants must submit to the Zoning Administrator a construction timeline and contact information for all of the excavators, landscapers, architects, builders, plumbers, and other contractors working on the site.

4. Prior to commencing construction, the applicants shall submit to and have approved by the Zoning Administrator a vegetation management plan showing the restoration of native trees, shrubs, and groundcover in all lands within the OHWM setback, slope preservation zone, and bluffline setback as necessary to make all structures on the property visually inconspicuous from the river and to enhance shoreland habitat.

5. Prior to commencing construction, the applicants shall submit to the Zoning Administrator a Compliance Deposit equal to the

application fee to be held by the Zoning Administrator until all conditions of the approval have been met, at which time the deposit will be refunded in full along with a Certificate of Compliance.

6. Prior to commencing construction, the applicants shall schedule an on-site pre-construction meeting with the Zoning Administrator to:

   - ensure that all pre-construction conditions have been met;
   - ensure that all contractors involved are aware of the conditions of the approval pertinent to the construction and excavation; and
   - ensure that the applicants' [sic] are aware of their roles and responsibilities as the property owners.

7. Prior to commencing construction, temporary fencing shall be installed around the drip lines of all trees around and within the construction site to protect them from damage and soil compaction caused by large equipment during the filling and grading activities and during the construction of the retaining walls. The applicants shall be responsible for maintaining and enhancing the current level of tree cover and adding shrub cover on the site to ensure long-term screening of the house and retaining walls from the St. Croix River as determined necessary by the Zoning Administrator.

8. Prior to commencing construction, the applicants shall submit to the Zoning Administrator certification from a registered professional structural engineer that the fill and the retaining walls will properly support the new home and will withstand pressure from floodwaters and wave action. Specifically, it should address all of the following items as recommended by the Department of Natural Resources:

   - The retaining walls shall be designed to withstand flood pressures, depths, velocities, uplift and impact forces, and other regional flood factors.
   - The retaining walls shall be stable under the most severe conditions and shall withstand saturated soils behind them that will exert significant pressures when the river level is down.
   - Soils behind the walls must be retained. Soils cannot be washed through the walls, and wave action over the top of the walls should not displace any materials.
   - The base of the wall will be subject to significant erosive forces during flooding, especially when the flood waters come to the base or slightly higher and wave action is significant. Undermining of the walls could cause failure of the wall and fill material that is supporting the main structure.

9. During construction, erosion control measures shall be maintained at all times and the smallest amount of bare ground shall be exposed for as short a time as possible. Temporary ground cover such as mulch shall be used and permanent native groundcover shall be planted.

10. All components of the new home – including the roof, trim, siding, and deck – must be earth-tone in color so as to be visually inconspicuous from the river.

11. Within 30 days of completing construction, the applicants shall submit to the Zoning Administrator record drawings of the site prepared by a registered surveyor and photographs of the property as viewed from the St Croix River.

12. Within 30 days of completing construction, the applicants must record an affidavit against the property describing the approved vegetation management plan, storm water management plan, and related maintenance and monitoring requirements with the County Register of Deeds. The intent is to make future owners aware of the responsibilities incurred in maintaining the storm water management areas and screening. The applicant must also submit a copy of the recorded affidavit to the Zoning Administrator.

13. Within 30 days of completing construction, the applicants shall submit to the Zoning Administrator an Elevation Certificate verifying

that the finished construction is above the regional flood elevation (RFE).

14. Any minor change or addition to the project, including but not limited to design of the project, shall require review and approval by the Zoning Administrator prior to making the change or addition. Any major change or addition to the originally approved plan will have to go through the variance and special exception approval process.

15. The applicants shall have one (1) year from the issuance of these approvals to commence construction and two (2) years to complete it. Failure to do so shall result in expiration of the variances and special exception permits, after which time the applicants will be required to secure new variances and special exception permits before starting or completing the project.

16. These conditions may be amended or additional conditions may be added if unanticipated circumstances arise that would affect the health and/or safety of citizens or degrade the natural resources of St. Croix County. Conditions will not be amended or added without proper notice to the applicant and an opportunity for a hearing.

17. Accepting this decision means that the applicant has read, understand, and agree to all conditions of this decision.

ADDENDUM FOR ADDITIONAL VARIANCE

Property Owner: Donna Murr (Et Al) Contractor/ Agent: _____

Property Location: ___ 1/4, ___ 1/4, Sec. ___, T. ___ N.,R. ___ W., Town of Troy

Computer #: ___-___-___-___ Parcel #: 040.1155.80.000 040.1155.85.000

State the nature of your request: Variance from lot requirements under Riverway Ordinance Sec. 17.36 I 4 a 1-3 See attached survey maps Zoning Ordinance Reference _____

Please answer the following questions and provide any additional information, plans, or other materials that you feel addresses these criteria in support of your request (*use backside of this sheet or attach additional paper as necessary*):

1) How does this request relate to the request on your original permit application?

   After the reconstruction of the home is complete, and the home is a conforming structure outside of the floodplain, we wish to redraw our lot lines. Each lot will remain at 1 acre +, but will have less than 1 acre of net project area due to the steep bluff.

2) Explain how literal enforcement of the Ordinance would unreasonably prevent you from using your property for a permitted use and

why the standards in the Ordinance should not apply to your property.

We currently own two adjacent lots which are 1 acre and just over 1 acre each now. However, neither lot currently has 1 acre of project area. Redrawing the lot lines will not create anything different from what we currently own. Also, the new home will be partially built on re-drawn lot & we will be unable to move the home further from the river in the best flood-proof location

3) Describe the unique characteristics of your property with respect to lot size, shape, topography, and other physical limitations that make literal enforcement of the Ordinance impractical. Were any of these limitations created by you or by past property owners?

We have a huge, steep hill in the middle of the property. This prevents 1+ acres of buildable project area on either lot.

4) What other options have you considered and why were they not chosen?

We considered reconstructing the entire home on "Lot B" (see attached survey map), but the best, flood-proof location is further back from the river and further west. This makes the redraw necessary.

5) Explain how granting this variance is consistent with protecting the public interest; in particular, explain how it will impact sensitive public resources and/or adjacent properties.

The redraw will keep the riverway in the area uncrowded as there will be no one putting a dock on the river. It will also allow us the save more trees and make the home less conspicuous from the river.

6) How is granting this variance consistent with the spirit and intent of the Ordinance; in particular, how will it meet the purpose of this zoning district(s) in which your property is located?

We are asking for a variance in much the same manner as many of our St. Croix Cove neighbors have done in the past. Granting this variance will be consistent with other variances approved in the past. The redrawn, as well as the current lots, are the same size or greater than most of our neighbors already.

I attest that the information contained in this addendum is true and correct to the best of my knowledge.

Property Owner
Signature: /s/ Donna L. Murr **Date** 2-6-06

Contractor/
Agent Signature:_____ **Date** _____

Jennifer Shillcox

From: Jon Sonnentag [jsonnetag@authconsulting.com]

Sent: Friday, March 10, 2006 2:54 PM

To: Jennifer Shillcox

Subject: Heaver

Jenny,

Attached are two revised maps that I hope should help with the net project areas (shaded). Please let me know if you have any questions.

Jon Sonnentag
Project Manager

S & N Land Surveying
2920 Enloe Street
Hudson, WI 54016
(715) 386-2007
(715) 381-5338(fax)
jsonnetag@authconsulting.com

MAR 10 2006

ST. CROIX COUNTY

CERTIFIED SURVEY MAP

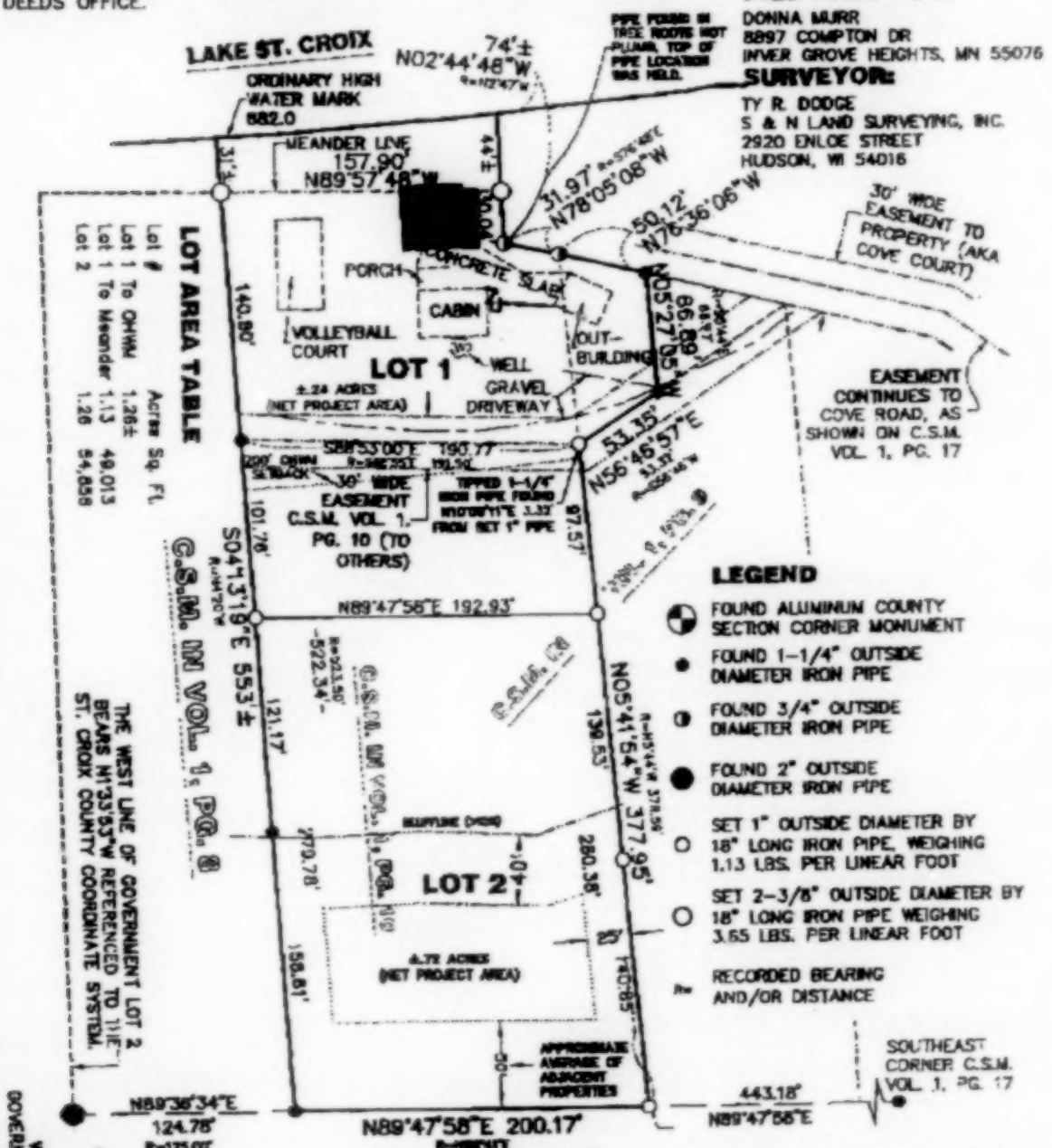
LOCATED IN PART OF GOVERNMENT LOT 2, SECTION 24, T28N, R20W TOWN OF TROY, ST. CROIX COUNTY, WISCONSIN, BEING A CERTIFIED SURVEY MAP IN VOLUME 1, PAGE 10 AND PART OF A CERTIFIED SURVEY MAP IN VOLUME 1, PAGE 9 AND PART OF A CERTIFIED SURVEY MAP IN VOLUME 1, PAGE 17, RECORDED IN THE ST. CROIX COUNTY REGISTER OF DEEDS OFFICE.

PREPARED FOR:

DONNA MURR
8897 COMPTON DR
INVER GROVE HEIGHTS, MN 55076

SURVEYOR:

TY R. DODGE
S & N LAND SURVEYING, INC.
2920 ENLOE STREET
HUDSON, WI 54016



LAKE AREA TABLE

Lot #	Acres	Sq. Ft.
Lot 1 To OHWM	1.26±	
Lot 1 To Meander	1.13	49,013
Lot 2	1.26	54,859

LEGEND

- FOUND ALUMINUM COUNTY SECTION CORNER MONUMENT
- FOUND 1-1/4" OUTSIDE DIAMETER IRON PIPE
- FOUND 3/4" OUTSIDE DIAMETER IRON PIPE
- FOUND 2" OUTSIDE DIAMETER IRON PIPE
- SET 1" OUTSIDE DIAMETER BY 18" LONG IRON PIPE, WEIGHING 1.13 LBS. PER LINEAR FOOT
- SET 2-3/8" OUTSIDE DIAMETER BY 18" LONG IRON PIPE WEIGHING 3.65 LBS. PER LINEAR FOOT
- (Rec) RECORDED BEARING AND/OR DISTANCE

EACH PARCEL SHOWN ON THIS MAP IS SUBJECT TO STATE, COUNTY AND TOWNSHIP LAWS, RULES AND REGULATIONS (I.E., WETLANDS, MINIMUM LOT SIZE, ACCESS TO PARCEL, ETC.) BEFORE PURCHASING OR DEVELOPING ANY PARCEL CONTACT THE ST. CROIX COUNTY ZONING OFFICE AND THE TOWN OF TROY FOR ADVICE.

THIS INSTRUMENT DRAFTED BY: WILLIAM KANE
JOB NO. 6468-01 DATE: 02/03/2006 REVISED 03/06/06

APPENDIX G

CIRCUIT COURT

STATE OF WISCONSIN ST. CROIX COUNTY

Joseph P. Murr,
Michael W. Murr,
Donna J. Murr and
Peggy M. Heaver

Petitioners,

vs.

State of Wisconsin and
St. Croix County,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Dec. 26, 2013)

Case: 12 CV 258

INTRODUCTION

In a memorandum decision and order issued October 31, 2013, the Court granted Respondent's Motion for Summary Judgment holding the Murrs' claim was barred by the applicable statute of limitations and that the St. Croix County Board of Adjustments ("Board") decision to deny the Murrs a variance was not a regulatory taking. Petitioners filed a Motion for Reconsideration arguing the Court erroneously concluded the Murr's claim is time barred and that there are material issues of fact concerning the economic and beneficial uses available for Lot E. (*See* Pet'r's. Br. at 1,4). The State and St. Croix County oppose the Motion because the Murrs have not shown any circumstances entitling them to relief under Wis. Stat. § 806.07; that the claim is time barred because the Murrs never had a vested interest; and because the Court properly concluded the

entire Murr property has not been deprived of all or substantially all beneficial use. (*See* State's Br.) (*See* St. Croix Cnty Br.)

DISCUSSION

Having reviewed the arguments presented, the Court finds Petitioners have not submitted newly discovered evidence or established a manifest error of law or fact. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis.2d 397, 416, 685 N.W.2d 853, 862 (Wis. Ct. App. 2004) ("To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact").

Petitioners' argument that their claim is not time barred merely rehashes the arguments raised in opposition to summary judgment. This Court rejected this very argument in its original decision and stands by its reasoning here.

Further, as already explained by this Court, even assuming Petitioners [sic] claim is not time barred, summary judgment was appropriate because the denial of the variance was not a regulatory taking. Contrary to Petitioners' arguments, the property must be evaluated as a whole. *See Zealy v. City of Waukesha*, 201 Wis.2d 365, 376-77 (Wis. Ct. App. 1995) ("[c]ases of the United States Supreme Court do not support the proposition that a *contiguous property* should be divided into discrete segments for purposes of evaluating a takings claim.") (emphasis added). More importantly,

to establish a regulatory taking government conduct must deprive a landowner of all or substantially all practical uses of the property. *Bettendorf v. St. Croix Cnty.*, 631 F.2d 421, 424 (7th Cir. 2011) (citing *Eternalist Found., Inc. v. City of Platteville*, 225 Wis.2d 759, 773, 593 N.W.2d 84 (Wis. 1999)). *See also R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 15, 244 Wis.2d 497, 628 N.W.2d 781. ("[w]e have in Wisconsin interpreted this latter category to include regulatory actions that deny the landowner all or substantially all practical uses of a property.") (internal quotations omitted). Petitioner's [sic] do not dispute the property has some practical uses and no genuine issue of material fact was created with respect to the suggested uses of the property as a whole.

Petitioners' [sic] correctly argue that the Court of Appeals did not decide whether the lots are formally merged into one lot (*See* Pet'r's Br. at 8). However, the Court of Appeals and the Murrs acknowledged the two parcels as "contiguous." *See Murr v. Board of Adjustment*, 2011 WI App 29, ¶¶ 2, 5, 332 Wis.2d 172, 796 N.W.2d 837. As such, this Court analyzed the takings claim of the "contiguous" property, as a whole, under the standards provided in *Zealy*.

Petitioners attempt to create a genuine issue of material fact with respect to the appraisals; however, in light of this Court's obligation to analyze the impact on the property as a whole, reliance on appraisal values that consider only a portion of the Murrs' property do not create a genuine issue of material fact. Further, Roger Koski expressly acknowledged he did not have

fair market values for the property; he only has assessment data. (*See* Koski Dep. 13: 13-18). Petitioners' [sic] have not cited legal authority that would create a genuine issue of material fact, specifically where the person testifying, Koski, stated he had no information as to the effect on fair market value.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that Petitioner's [sic] Motion for reconsideration is **DENIED**.

BY THE COURT:

Dated this 26th day of December 2013.

/s/ Scott Needham
Honorable Scott Needham
St. Croix County Circuit Court Judge
Branch III

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 10 2016
OFFICE OF THE CLERK

No. 15-214

In the Supreme Court of the United States

JOSEPH P. MURR, ET AL., PETITIONERS,

v.

STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

BRIEF FOR RESPONDENT STATE OF WISCONSIN

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QUESTION PRESENTED

Whether land lots that were created and defined under state law, which merged pursuant to a preexisting state law merger provision, are a single "parcel" for regulatory takings purposes.

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INTRODUCTION

Since 1976, Wisconsin law has provided that when contiguous substandard lots within the Lower St. Croix National Scenic Riverway come into common ownership, those lots merge, such that they cannot be sold or developed separately. Wisconsin law also includes a grandfather clause that protects those who owned land in the area on January 1, 1976. This pairing of a lot merger provision with a grandfather clause is how many States reasonably strikes the balance between phasing out substandard lots to reduce overcrowding and safeguarding property owners' settled expectations.

Petitioners voluntarily triggered this state law merger provision by bringing two contiguous substandard lots into common ownership through real estate transactions that concluded in 1995. After being denied certain variances and conditional uses, Petitioners filed a takings claim. Given that takings analysis "has traditionally been guided by the understandings of our citizens regarding the content of . . . the 'bundle of rights' that they acquire *when they obtain title to property*," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added), it is plain that Petitioners took title to a single merged lot in 1995 under both state law and takings law. The land at issue is thus a "single" parcel, just as the Wisconsin Court of Appeals properly held. Petitioners' argument that the courts should view their land as two separate parcels, based upon how they were

treated under state law before they triggered the merger provision, would "divide a single parcel into discrete segments," something this Court has held impermissible. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

While Petitioners' land is one parcel under any reasonable approach, the State of Wisconsin respectfully submits that this Court should decide this case in a manner that provides guidance in this complex area of law. Identifying the relevant "parcel" for regulatory takings purposes has been a "difficult, persisting question." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). This problem can be solved by the approach that this Court suggested in *Lucas*: the relevant parcel should be identified by property owners' objectively "reasonable expectations" as "shaped by the State's law of property." 505 U.S. at 1016 n.7. This approach would provide an objective basis for identifying the relevant parcel, while giving sufficient respect to all of the interests at stake.

STATEMENT

A. Land Lots Are Creatures Of State Law

1. Under the Constitution, each State has the sovereign right to control the creation and significance of lot lines within its borders. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 708 (2010) ("Generally speaking, state law defines property interests . . . ."); *McKeen v. Delancy's*

Lessee, 9 U.S. (5 Cranch) 22, 32 (1809) (recognizing the primacy of "the statutes of a state on which land titles depend"). Indeed, a "lot" in this country is now defined as a "plot or portion of land assigned *by the state* to a particular owner." 9 *Oxford English Dictionary* 40 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (emphasis added); *see also id.* (explaining that this meaning of the term "lot" applies "[n]ow chiefly in *U.S.*").[1]

2. Historical practice supports the understanding that lot lines are creatures of state law.

Since at least the early 16th Century, English landholdings were defined through "naming and bounding" by way of written "metes and bounds." David Buisseret, *The Mapmakers' Quest: Depicting New Worlds In Renaissance Europe* 152 (2003).[2] "Metes"

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[1] Municipalities, zoning boards, and other local entities are "merely [ ] department[s] of the state," and thus "remain[ ] the creature[s] of the state exercising and holding powers and privileges subject to the sovereign will." *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

[2] Of course, boundaries were not invented by the English. The Romans celebrated a festival called "Terminalia" to honor the god of boundaries during which "landowners would meet at their common boundary stone." Walter G. Robillard & Donald A. Wilson, *Brown's Boundary Control and Legal Principles* 4 (4th ed. 1995). The Greeks labeled boundaries as "sacrosanct." *Id.* at 3. And the Bible confirms the long pedigree of land boundaries: "Do not move your neighbor's boundary stone set up by your predecessors in the inheritance you receive in the land the Lord your

literally means "measurements" or "to assign measurements," while "bounds" simply means "boundaries." 9 Julius L. Sackman, et al., *Nichols on Eminent Domain*, § G33.03(2)(a) (3d ed. 1997).[3] Describing lands by "metes and bounds" relied upon local geographical features such as marks on the ground, fences, physical monuments, and natural features, such as rivers. *Id.* A typical description for a small parcel would be: "Bounded on the north by Bog Creek . . . bounded on the east by a stone wall . . . ." 11 *Thompson on Real Property* § 94.07(s)(1) (David A. Thomas ed., 2d ed. 2009). Metes and bounds were then recorded in official cadastral survey books. *See*

God is giving you to possess." *Deuteronomy* 19:14 (New International Version).

[3] In Medieval England, the ritual of "beating the bounds" was of particular importance to defining the boundaries of a parish, manor, or royal forest. Allegra di Bonaventura, *Beating the Bounds: Property and Perambulation in Early New England*, 19 Yale J.L. & Human. 115, 118 (2007). These "periodical surveys" preserved "ancient boundaries" by, among other methods, requiring young boys to beat a boundary mark "with peeled willow wands to impress its location on their memories." 3 *The New International Encyclopedia* 16 (2d ed. 1917). "[T]o preserve evidence of particular boundaries," the "boys themselves" were sometimes whipped "on the spot" in exchange for a fee, "it being thought that the impression made on the memory was thus more likely to be lasting." *Id.* The testimony of boys —beaten during these ceremonies—was used to settle more than one boundary dispute. *See* Walter G. Robillard, et al., *supra*, at 6; Bob Bushaway, *By Rite: Custom, Ceremony and Community in England 1700-1880*, 84 (1982).

Judith A. Tyner, *The World of Maps: Map Reading and Interpretation for the 21st Century* 51 (2015).

American colonists imported this metes-and-bounds system into the New World, using this recording method to divide up the abundant land that they sought to distribute and develop. *See* 14 Richard R. Powell, *Powell on Real Property* § 81A.05(b)(i) (Michael Allan Wolf ed., 2013); *see also* 1 Walter Robillard, *Clark on Surveying and Boundaries* § 6.01 (8th ed. 2014). The term "lot" derives from the practice of "casting of lots," a method of selecting plots of land for development commonly used by American settlers. 1 *Thompson on Real Property*, *supra*, § 6.12(e)(2); 9 *Oxford English Dictionary*, *supra*, at 40 (citing early American usages).

As Americans moved westward, the need to describe accurately the subdivision of raw land into saleable tracts became critical. Following the adoption of the Land Ordinance of 1785, the land of the future State of Wisconsin (along with Ohio, Indiana, Illinois, and Michigan) was surveyed, mapped, and organized into a "rudimentary framework for control of [future] land subdivisions." Rodger A. Cunningham, William B. Stoebuck, & Dale A. Whitman, *The Law of Property* § 9.15 (Lawyer's ed. 1984). The Land Ordinance relied heavily on the term "lot" (using the term twenty times), calling for "plats of [ ] township[ ] . . . marked by subdivisions into lots of one mile square, or 640 acres." Ordinance of May 20, 1785, 28 J. Continental Congress 376 (John C. Fitzpatrick ed., 1933). While

some "lots" were to be reserved for the United States, and others reserved for "the maintenance of public schools," and the remainder "so many lots" were to be reserved "for future sale." *Id.* at 378.

Three different methods of land division ultimately came into common usage: metes and bounds, government survey, and lot and block. *See* 11 *Thompson on Real Property*, *supra*, § 94.07(s). Metes and bounds is a system used to describe property based on landmarks and the length and direction of the boundaries from the perspective of someone walking the property. *See id.* § 94.07(s)(1). The government survey system divides up newly acquired public land into future saleable grids by creating "guide meridians," "townships," and "sections" or "lots." *Id.* at § 94.07(s)(2); *see also* Walter Robillard, *supra*, § 5.01; Cunningham, Stoebuck, & Whitman, *supra*, § 9.15. Finally, the lot and block system subdivides larger tracts of land, generally in urban and suburban areas. "When a tract is to be sold out in small parcels, it is customary to have the land surveyed into lots, or into blocks which in turn are subdivided into lots." 3 *American Law of Property* § 12.102 (Casner ed. 1952). The lots are recorded on a "plat of a survey [ ] filed with the recording office and copied into a 'plat book.'" *Id.* A "plat," in turn, is a "map or plan of delineated or partitioned ground; esp., a map describing a piece of land and its features, such as boundaries, lots, roads, and easements." *Plat* (2), *Black's Law Dictionary* (10th ed. 2014).

Today, parcels of land can be described using any of these systems, and sometimes more than one. *See* 11 *Thompson of Real Property*, *supra*, §§ 94.07(s), (s)(3); *see also* 4 *Tiffany Real Property* §§ 992, 994 (3d ed. 2015). For example, the lots at issue in this case are described both by reference to certified survey maps filed in the county register of deeds and by metes and bounds descriptions. JA 11–12.

3. As part of the very first laws passed after statehood, Wisconsin required all towns to be surveyed, with lots described on a plat map, and recorded with a county register of deeds. *See* Wis. Laws of 1849, ch. 41, §§ 1, 2, & 6.

Today, Wisconsin law provides for the creation of lots through the subdivision of land, which involves an initial survey of land and the creation of a plat map identifying the lot lines and each lot's area in square feet. Wis. Stat. §§ 236.03, .20(2)(c), (e), & (j). The final plat must then be recorded, subject to the approval of appropriate officials or boards. *See* Wis. Stat. §§ 236.10–.295; *Town of Sun Prairie v. Storms*, 327 N.W.2d 642, 643 (Wis. 1983).

Wisconsin law does not require that platted lot lines be permanent fixtures, although property owners must comply with state law when redrawing or adjusting those lines. So long as the change does not alter the exterior boundaries of the lot, the lot may be altered using the same methods utilized for subdivisions of property. *See* Wis. Stat. §§ 236.02(11), .45.

Such an alteration may be accomplished by either a "certified survey map" or a plat, depending on the number of lots created in the alteration and the applicable local ordinances. Wis. Stat. §§ 236.34, .45. A "certified survey map" is less involved than a plat and requires fewer administrative approvals. *Compare* Wis. Stat. § 236.34 *with* §§ 236.10–236.21. If the change requires the alteration of the exterior boundaries of the lot, then a replat is required. *See* Wis. Stat. § 236.02(11). If the replat affects areas designated for public use, then it must be approved by a court in the county in which the land is located. Wis. Stat. § 236.36. Any alteration must comply with all applicable state and local regulations and be approved by the relevant officer or committee before being recorded with the office of the register of deeds of the county in which the land is situated. Wis. Stat. §§ 236.10, .13, .25, .335, .34.

Unless a specific state law or regulation, or state-authorized local law, ordinance or regulation, provides to the contrary, each platted lot in Wisconsin may be sold and developed separately from its neighboring lots. *See generally* Wis. Stat. §§ 706.01(7r), .02, .05.

B. Lot Merger Is A Commonly-Used Tool For Phasing Out Substandard Lots

A "substandard lot" is a parcel of land that fails to meet minimum lot-size requirements. 7 Patrick J. Rohan, *Zoning and Land Use Controls* § 42.03(2)(a)

(Eric Damian Kelly ed., 1997). "[L]ots that are lawfully subdivided when they are created are classified as nonconforming 'substandard' lots when subsequent regulations increase the minimum lot size, setbacks, or other dimensional requirements." 2 Patricia E. Salkin, *American Law of Zoning* § 12.12 (5th ed. 2016). The need to phase out substandard lots, while protecting property owners' settled expectations, is a recurring challenge in real property law. States and their political subdivisions have endeavored to solve this problem by adopting a variety of minimum lot-size restrictions, grandfather clauses, and merger provisions.

1. During the mid-19th century, many States did not have any minimum lot-size restrictions. *See* 7 Rohan, *supra*, § 42.03(2)(a). As a result, "land speculation led to the platting of thousands of subdivisions," and "[m]any of these were poorly designed, with small lots and inadequate streets, and were lacking utilities." 13 Richard R. Powell, *supra*, § 79D.03(1)(b).

As States realized the "host of evils" that narrow lots created, *see* U.S. Department of Commerce, *A Standard City Planning Enabling Act* 27 n.71 (1928), and the "benefits" that minimum lot provisions could provide, Salkin, *supra*, § 9:66, they amended their laws to provide for such regulations. For example, while Wisconsin's original laws did not contain any minimum lot-size requirements, that eventually changed. In 1955, Wisconsin passed a statute requiring that, in counties having a population of less than

40,000 residents, "each lot in a residential area shall have a minimum average width of 60 feet and a minimum area of 7,200 square feet." Wis. Laws of 1955, ch. 570, § 4 (codified at Wis. Stat. § 236.16). The law was later amended to require lots to have "access to a public street unless otherwise provided by local ordinance." Wis. Laws of 1961, ch. 214, § 11 (codified at Wis. Stat. § 236.20(4)(d)). The law permitted cities, towns, and counties to adopt more restrictive requirements, including more restrictive minimum lot-size requirements. Wis. Laws of 1955, ch. 570, § 4 (codified at Wis. Stat. § 236.45).

2. When a State or its political subdivisions adopts a new minimum lot-size restriction, existing lots are often rendered substandard. *See* 3 Arden H. Rathkopf, et al., *Rathkopf's The Law of Zoning and Planning* § 49:4 (4th ed. 2016). Absent other relief, these substandard lots could not be developed, working a hardship upon the owners. *See id.* § 49:16. Accordingly, lot-size restrictions typically include grandfather clauses, permitting the continued use of now substandard lots. *See id.* § 49:25. These grandfather clauses are generally limited to lots in single, separate ownership at the time of the enactment of the minimum lot-size restrictions. *See id.* § 49:13.

Lot merger is a companion concept to minimum lot-size restrictions and grandfather clauses. Because the combination of lot-size restrictions and concomitant grandfather clauses is designed to eliminate substandard lots while protecting settled property rights,

state law will often include a merger provision, either in the regulatory text or by way of judicial construction. *See* Salkin, *supra*, §§ 9:69, 12:12 & n.8 (collecting cases). A merger provision typically requires that contiguous substandard lots that come into common ownership will merge into one lot, such that they cannot be separately developed or sold. *Id.*; *see also* Rathkopf, *supra*, § 49:13; Rohan, *supra*, § 42.03(2)(a).

3. Many States have addressed the merger of nonconforming lots, and have done so in a variety of ways, reflecting varying policy preferences and special needs. In addition, many municipalities have adopted merger provisions, consistent with authorization granted under state law. *See generally* Rathkopf, *supra*, § 49:13. This subsection provides a brief sampling of some approaches to merger adopted by state legislatures themselves, which is only a small slice of such provisions that have been adopted by States and their subdivisions.

Some States provide explicit permission to local governmental units to enact merger provisions, subject to certain mandatory standards. California, for example, allows municipalities to adopt ordinances merging contiguous, commonly owned parcels, assuming that one of the lots is nonconforming. *See* Cal. Gov. Code § 66451.11. Similarly, Rhode Island authorizes cities and towns to adopt merger provisions for "contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership," in order to create "dimensionally conforming

lots or to reduce the extent of dimensional nonconformance." R.I. Gen. Laws § 45-24-38.

Other States either require or prohibit merger under certain conditions. Minnesota, for example, mandates that counties "regulate the use of nonconforming lots" in "shoreland areas" by, among other ways, ensuring that "two or more contiguous lots of record under a common ownership," which do not meet certain minimum standards, "must be combined . . . as much as possible." Minn. Stat. § 394.36(5)(c) & (d); *see id.* § 394.36(5)(e) (grandfather clauses). Vermont, in turn, allows merger by local ordinance unless the nonconforming lot meets appropriate standards for water supplies and wastewater systems. Vt. Stat. tit. 24, § 4412(2)(B).

Some States significantly limit the authority of political subdivisions to merge lots without the owners' consent. New Hampshire provides only for "voluntary merger," N.H. Rev. Stat. § 674:39-a, and even gives landowners a method for un-merging ("restored to their premerger status") if lots were "involuntarily merged prior to September 18, 2010," *id.* § 674:39-aa. Colorado similarly requires "consent to the merger of said parcels." Colo. Rev. Stat. § 30-28-139(2)(a). Other States are particularly concerned with notice and process, such as New Mexico, which allows merger of contiguous parcels only after "notice and public hearing." N.M. Stat. § 47-6-9.1; *see also* Cal. Gov. Code § 66451.13; Colo. Rev. Stat. § 30-28-139(1)(a).

Finally, some States have internally diverse merger regulations, providing for merger in different circumstances. California, for example, employs a subdivision statute specifically related to Napa County. Cal. Gov. Code § 66451.22. This statute explains that in order to "adequately protect the value and productivity of the county's agricultural lands, Napa County needs relief from the Subdivision Map Act's implied preemption of local ordinances that may require merger of parcels that do not meet current zoning and design and improvement standards." *Id.* § 66451.22(a)(4). Minnesota similarly contains a merger provision designed specifically for "shoreland lots." Minn. Stat. §§ 394.36 & 462.357(1e)(d).

C. Factual Background

1. "The Lower St. Croix Riverway is a narrow corridor that runs for 52 miles along the boundary of Minnesota and Wisconsin, from St. Croix Falls/Taylors Falls to the confluence with the Mississippi River . . . ." *Cooperative Management Plan: Lower St. Croix National Scenic Riverway* (Jan. 2002), at 3.[4] "The riverway's scenery, plentiful fish and wildlife, largely unpolluted, free-flowing character, numerous access points, and closeness to the Twin Cities attract many people in the late spring, summer, and fall." *Id.* The River "exhibits a highly scenic course," complemented by "a lake-like river environment" near Petitioners'

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[4] https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf.

property. *Sierra Club N. Star. Chapter v. Pena*, 1 F. Supp. 2d 971, 982 (D. Minn. 1998) (citation omitted). In 1972, Congress designated the Lower St. Croix Riverway as one of the "selected rivers of the Nation, which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." *See* 16 U.S.C. § 1271.

The Wisconsin Legislature has enacted special protections for this area to fulfill the State's responsibility to "protect and preserve [Wisconsin's] waters for fishing, hunting, recreation and scenic beauty." *Wisconsin's Envt'l Decade, Inc. v. Dep't of Nat. Res.*, 271 N.W.2d 69, 72 (Wis. 1978). In particular, the Legislature required the Wisconsin Department of Natural Resources (WDNR) to adopt "specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Wis. Stat. § 30.27(2)(a). The standards must regulate new construction and establish "acreage, frontage and setback requirements." *Id.* § 30.27(2)(a)2. The Legislature also required all "counties, cities, villages and towns lying, in whole or in part, within the" River to "adopt zoning ordinances complying with the [WDNR] guidelines and standards." *Id.* § 30.27(3).[5]

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[5] Wisconsin worked with Minnesota and the Federal Government to develop a cooperative management plan for the River. *See Cooperative Management Plan: Lower St. Croix National Scenic Riverway* (Jan. 2002), https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf. Wisconsin's

WDNR satisfied its duty under Wis. Stat. § 30.27 by adopting mandatory standards for St. Croix River zoning regulations. Wis. Admin. Code ch. NR 118. The WDNR regulations provide that the Lower St. Croix Riverway be divided into five management zones, with different minimum lot sizes for different management zones. *Id.* § NR 118.04. In the rural residential zone, where Petitioners' property is located, JA 66, WDNR requires that "[t]he minimum lot size [ ] have at least one acre of net project area." Wis. Admin. Code § NR 118.06(1)(a)2.a. "Net project area" is defined as "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." *Id.* § NR 118.03(27). A lot that does not conform to the minimum lot size requirement is deemed "substandard." *See id.* § NR 118.03(48).

The WDNR regulations include a grandfather clause for lots rendered substandard by the new lot size requirements, which provides that "[l]ots of record in the register of deeds office on January 1, 1976 . . . which do not meet the requirements of this chapter, may be allowed as building sites provided that" either "[t]he lot is in separate ownership from abutting lands, or [t]he lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area." *Id.* § NR 118.08(4). The standards also

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participation in this project was voluntary, *see* 16 U.S.C. § 1283(a), and the State protects the Wisconsin portion of the River through its own sovereign choices.

provide that "[a]djacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area." *Id.*[6]

The Wisconsin Court of Appeals has adopted an authoritative interpretation of the WDNR regulations as merging two substandard, contiguous when those lots come into common ownership. *Murr v. St. Croix Cnty. Bd. of Adjust.* (*Murr I*), 796 N.W. 2d 837, 844 (Wis. Ct. App. 2011).[7] In a section of a published opinion titled "Merger of Lots," the court rejected the argument that for lots to merge, the State must have adopted a more "explicit merger clause." *Id.* at 843. Instead, the court interpreted the WDNR regulations as merging "adjacent substandard lots [when such lots] come under common ownership." *Id.* at 844. Given that this interpretation of the WDNR regulations was entered in a case involving the same parties as those here, this interpretation is binding. *See Masko v. City of Madison,* 665 N.W.2d 391, 394–95

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[6] As required by state law, Wis. Stat. § 30.27(3), St. Croix County has adopted zoning ordinances at least as restrictive as the WDNR regulations. *See* JA 7; *see also* St. Croix County, Wis., Code of Ordinances § 17.36 (2005); Wis. Admin. Code § NR 118.02(3). For simplicity, the State refers only to the WDNR regulations.

[7] This was Petitioners' appeal in a separate, but related case, which is not under review by this Court. *See infra* pp. 19–20.

(Wis. Ct. App. 2003); *Wis. Pub. Serv. Corp. v. Arby Const., Inc.*, 818 N.W.2d 863, 870 (Wis. 2012).[8]

2. Petitioners' property sits in the middle of the Cove Court subdivision in St. Croix County, which

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[8] The WDNR regulations, Wis. Admin. Code ch. NR 118, which have undergone several changes since originally promulgated in 1975, are admittedly "not a model of clear draftsmanship." *Murr I*, 796 N.W.2d at 843; *see* Wis. Admin. Reg., Dec. 1975, No. 240, at 96-10 (providing that "substandard lots" that are "of record in the register of deeds office on the effective date of these rules or an enactment of amendment of the local ordinance" otherwise conforming to zoning and sanitary code requirements "may be allowed by the county as building sites provided that [t]he lot is in separate ownership from abutting lands"); Wis. Admin. Reg., June 1980, No. 294, at 392-1 (providing that pre-existing "substandard lots" otherwise conforming to zoning and sanitary code requirements "may be allowed as building sites provided that . . . [t]he lot is in separate ownership from abutting lands, or, if lots in an existing subdivision are in common ownership, that each of the lots have at least one acre of net project area"); Wis. Admin. Reg., Aug. 1986, No. 368, at 438 (clarifying that the grandfather clause applies to "[substandard] [l]ots of record in the register of deeds office on January 1, 1976 or the date of enactment of an amendment to a local ordinance"); Wis. Admin. Reg., Oct. 2004, No. 586, at 182-1 (adding the provision that "[a]djacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area"). Any ambiguities in the text—either in its present form or during its various prior iterations—are not part of this case because the Wisconsin Court of Appeals adopted a definitive interpretation of the WDNR regulations in 2011, which is binding on the parties.

subdivision "features some of the most crowded development" in the rural residential zone of the Lower St. Croix Riverway. JA 66. Originally platted as two separate lots in the 1950s, JA 11–12, Lots E and F are bisected by a steep slope, with a drop of roughly 130 feet down to the water. JA 30; *see* JA 22, 28, 60 (maps). While each lot is approximately 1.25 acres, JA 6, because of the slope, neither lot has more than one acre of net project area. Accordingly, both lots are substandard under the WDNR regulations. Wis. Admin. Code § NR 118.08(6)(1)(a)2.a; JA 40. Lot F contains a building site with a cabin, while Lot E has no building site. JA 75.

As of January 1, 1976, the lot with the cabin, Lot F, was owned by William Murr Plumbing, Inc., and the vacant Lot E was separately owned by William and Margaret Murr. JA 6. As a result, the two Lots did not merge in 1976 under the WDNR regulations. Petitioners took title to both lots in two separate real-estate transactions in 1994 and 1995, thus merging them under state law. JA 20.[9]

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[9] As Petitioners have conceded, the two Lots actually first came under common ownership in 1982 when Lot F was "transferred from William Murr Plumbing, Inc. back to [the Murr parents]." Br. of Pet.-Appellant-Cross-Resp't, Murr I, 796 N.W.2d 837 (Wis. Ct. App. 2011) (No. 2008AP2728), 2009 WL 3848184, at *17 n.1. Thereafter, the Murr parents transferred Lot F and Lot E to Petitioners in 1994 and 1995, respectively. JA 6. The 1982 transaction has no relevance to the issues before this Court,

In 2006, Petitioners sought a variance from the St. Croix County Zoning Board of Adjustment for numerous issues, including to allow both lots to be used as "separate building sites." JA 62. The Board denied the variance, noting that Petitioners' two contiguous lots were substandard and in common ownership and that they could only be "developed and sold jointly as a single, more conforming parcel that is more suitable for residential development." JA 65. The Board explained that granting the variance "could result in yet another residence with access to the river, additional tree cutting and excavating, and another sanitary system in an area with serious limiting factors." JA 66. The Board also stated that development could lead to "soil erosion and pollution and contamination of surface water and groundwater," insufficient "space on lots for sanitary facilities," potential "flood damage," and detrimental impacts on "property values." JA 66. At least "eight other property owners in the immediate Cove Court/Cove Road area own one or more contiguous substandard lots along the river with just one building site." JA 67.

Later in 2006, Petitioners brought suit in St. Croix County Circuit Court, which—as relevant here—affirmed the Board's decision denying the variance to sell or use the two lots as separate building sites. *Murr I*, 796 N.W.2d at 840. On appeal, in 2011, the

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given that the parties have litigated the takings case on the assumption that the merger provision did not trigger until 1995.

Wisconsin Court of Appeals upheld the Board's decision. *Id.* at 840, 846. Petitioners argued that the lots had not merged because of the grandfather clause. *Id.* at 843. The Court of Appeals rejected this argument, holding that the grandfather clause did not apply and that Lot E and Lot F merged in 1995 when the two lots came under common ownership. *Id.* at 844. In reaching this decision, the court also gave an authoritative interpretation of the meaning of the WDNR regulations, as discussed above. *See supra* pp. 16–17. On May 24, 2011, the Supreme Court of Wisconsin denied review in the case, and upon remittur, the Court of Appeals' decision became the final judgment in the case. *See Murr v. St. Croix Cnty. Bd. Adjustment*, 803 N.W.2d 849 (Table) (Wis. 2011).[10]

3. Shortly after losing their appeal, in 2012, Petitioners filed a new action under Wis. Stat. § 32.10 and Article I, Section 13 of the Wisconsin Constitution, Wisconsin's takings clause, claiming that their property was taken without just compensation. The circuit court granted summary judgment to the defendants, finding that Petitioners' claim was time-barred. The court also analyzed the alleged taking "on the Murrs' property as a whole, not each lot individually." Pet. App. A-6. The court held that there was not a taking because the "Murrs' property, taken as a whole, could be used for residential purposes,

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[10] Following final judgment definitively determining that the lots had merged, the St. Croix County Treasurer began taxing the lots under one, single assessment. *See* JA 23.

among other things." Pet. App. A-6. Specifically, the circuit court noted that a "year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." Pet. App. A-6. Whatever the loss, it did not amount to an unconstitutional taking—"the merger decreased the property value by less than ten percent." Pet. App. A-6.

On appeal, the Wisconsin Court of Appeals, in an unpublished, per curiam decision, affirmed. The court explained that, under the WDNR regulations, Petitioners "*never* possessed an unfettered 'right' to treat the lots separately." Pet. App. A-17–18 (emphasis added). "The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots." Pet. App. A-3. The court focused on the Petitioners' "property as a whole," noting that there is "no dispute that their property suffices as a single, buildable lot under the Ordinance." Pet. App. A-12.

In rejecting Petitioners' argument that the property should be segmented into two lots, for purposes of the takings analysis, the Court of Appeals relied upon the Supreme Court of Wisconsin's decision in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996). *See* Pet. App. A-10–11. In *Zealy*, the landowner had argued that the city accomplished a regulatory taking by creating a conservancy district over 8.2 acres of his single 10.4-acre parcel. *Zealy*, 548 N.W.2d at 529–30. In ruling for the landowner, the

Zealy Court of Appeals "held that a landowner's anticipated investment opportunities should be examined in order to determine what the parcel at issue should be." *Id.* at 532. The *Zealy* Supreme Court reversed, rejecting the owner's attempt to segment a single parcel based upon his claimed plans to use different parts of the property for different purposes. *Id.* at 535. The court noted the "difficulty in the application of the rule" that would look to the "landowner's subjective intent," adding that such an approach "would confuse both the agencies responsible for zoning and the courts called on to adjudicate such claims, and increase the difficulty of an already complex inquiry." *Id.* at 533.

Like the landowner in *Zealy*, Petitioners sought to segment a single parcel—that is, the combined Lots E and F after they merged in 1995—by relying upon their subjective plans for the property. Pet. App. A-3. The Court of Appeals in this case was thus entirely correct that *Zealy* prohibited such segmentation. Pet. App. A-10–11. However, in broad wording that was not necessary to its decision, the court also made the apparently categorical assertion that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." Pet. App. A-11.

The Court of Appeals then concluded its analysis by noting that "[t]here is no dispute that the property suffices as a single, buildable lot," and that Petition-

ers may "build a year-round residence" "located entirely on Lot E, entirely on Lot F" or "straddl[ing] both lots." Pet. App. A-12–13. Petitioners can make whatever arrangement they want as to the land, subject, of course, to other regulations, so long as they recognize that the merged lot is a "single, buildable lot" with a single residence. Pet. App. A-12. Because of the many options available, the court found no taking. Pet. App. A-13.

Petitioners sought review in the Supreme Court of Wisconsin, but their petition for review was denied. *Murr v. Wisconsin*, 862 N.W.2d 899 (Table) (Wis. 2015). Petitioners then filed a petition for certiorari in this Court, the State waived its response and St. Croix County opposed. This Court then granted certiorari. 135 S. Ct. 890 (Jan. 15, 2016).

SUMMARY OF ARGUMENT

I. This Court has developed a regulatory takings jurisprudence that requires courts to identify, as a threshold matter, the relevant "parcel" that is allegedly being taken. While this Court has never definitively explained how to define the relevant parcel, *Lucas* offered an important clue: "The answer to th[e] difficult question" of identifying the relevant parcel "may lie in *how the owner's reasonable expectations have been shaped by the State's law of property*." 505 U.S. at 1016 n.7 (emphasis added). The State of Wisconsin submits that the approach suggested by *Lucas* is the proper method for identifying the parcel.

The *Lucas* approach is consistent with this Court's caselaw. This Court has uniformly identified the property rights protected by the Takings Clause as those recognized by state law, *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), *Stop the Beach*, 560 U.S. at 708, including when it comes to real property, *see Penn Central*, 438 U.S. at 130–131; *Lucas*, 505 U.S. at 1030. It is thus entirely sensible to look to the reasonable expectations shaped by that same state law when determining the relevant "parcel."

The approach suggested by *Lucas* is particularly appropriate when applied to land lots. The definition, alteration, and significance of lot lines are creatures of state law, and have been from the Founding. Where the State has chosen to make separately platted lots individually developable and saleable, a landowner's objectively reasonable expectations will naturally be that a lot is a separate "parcel." On the other hand, when a substandard land lot is subject to a merger provision under state law, such that it cannot be sold and developed separately from a neighboring, commonly owned lot, then the owner's objectively reasonable expectations would be that the lot is not a separate parcel. And, of course, each State has the sovereign right to decide the significance of lot lines in any particular locale, which decisions will shape property owners' objectively reasonable expectations.

Adopting the *Lucas* approach for land lots would forward "fairness and justice." *Armstrong v. United*

States, 364 U.S. 40, 49 (1960). By focusing on the *objective* expectations as shaped by state law, this methodology would ensure that all land that is regulated identically under state law is treated equally for regulatory takings purposes, without regard to property owners' idiosyncrasies or subjective plans for the land. The *Lucas* approach would also help to minimize strategic behavior by both sovereigns and property owners by establishing an objective baseline for determining the parcel. Notably, if a State sought to unexpectedly change its law, without providing adequate grandfather protection, that change itself could be subject to a challenge under the Takings Clause.

II. Applying the approach suggested by *Lucas* to the facts of the present case, it is clear that Lots E and F are a single parcel. When Petitioners "obtain[ed] title to" Lot E, *Lucas*, 505 U.S. at 1027, their objectively reasonable expectations were that, pursuant to the WDNR regulations, they would take title to a single merged parcel, not to two separate lots. As a result, Lots E and F are a single parcel for any regulatory takings claim that Petitioners would want to bring, whether that claim is against the State for regulating their land, as they have in this case, or against the Federal Government for any regulation that the Government may adopt.

The Wisconsin Court of Appeals was thus entirely correct to reject Petitioners' request to segment their merged parcel into two separate parcels for purposes of their regulatory takings claim. Petitioners' efforts

to distinguish between segmenting a single parcel (which *Penn Central* prohibits) and aggregating separate parcels (which *Lucas* explained is "unsupportable") thus cut entirely against their argument because this is a segmentation case, not an aggregation case. And to the extent Petitioners and their *amici* are concerned about a rule that would aggregate all contiguous, commonly-owned lots, that is not the law, as *Lucas* itself made clear. Rather, the inquiry in each case is the objectively reasonable expectations of the landowners, as shaped by state law. Where, as here, property owners acquire two substandard lots that are subject to a preexisting lot merger provision, those reasonable expectations are that they take title to a single merged parcel.

III. If this Court concludes that the approach suggested by *Lucas* is not appropriate, and instead adopts a multifactor test like that used by some lower courts, the result in the present case would be the same. In light of the preexisting lot merger provision, Petitioners had no economic expectations of being able to develop and sell Lot E separately from Lot F. That the lots are contiguous, were acquired by Petitioners just one year apart, and have been consistently treated by Petitioners as a single piece of land further support the conclusion that Lots E and F are a single parcel.

ARGUMENT

I. As This Court Suggested In *Lucas*, The Relevant Land "Parcel" Should Be Defined By Objectively "Reasonable Expectations," As "Shaped By The States' Law Of Property"

A. The Fifth Amendment's mandate that "private property [shall not be] taken for public use, without just compensation," U.S. Const. amend. V, is applicable to the States under the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 536 (2005) (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987)). The Clause offers protection from the government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 537 (quoting *Armstrong*, 364 U.S. at 49).

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court properly recognized that the Takings Clause applies to what has become known as "regulatory takings." *Mahon* explained that if the Takings Clause was limited only to physical appropriations of property, "the natural tendency of human nature [would be] to extend the qualification more

and more until at last private property disappear[ed].'" *Id.* at 415. *Mahon* did not provide extensive guidance as to how to identify the "property" allegedly being taken, or how to measure whether a taking had, in fact, occurred. *See Lingle*, 544 U.S. at 537–38; *Lucas*, 505 U.S. at 1015. Instead, this Court offered the guiding principle—"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," *Mahon*, 260 U.S. at 415—leaving it to future cases and the common law method to work out the doctrine needed to give life to this protection.

Since *Mahon*, this Court has delineated two categories of regulatory takings claims that require the court to identify the specific "parcel" allegedly being taken. First, where the regulation "denies all economically beneficial or productive use of land," there is a *per se* taking, requiring just compensation. *Lucas*, 505 U.S. at 1015. Identifying the relevant parcel is also critical to this type of takings claim because only by pinpointing the particular property can a court determine whether the challenged governmental action denies "all" economic value of that property. *Id.* at 1015–16 & n.7. Second, the vast majority of regulatory takings cases fall under the three-part framework articulated in *Penn Central*, 438 U.S. 104. Identifying the relevant parcel is critical to this inquiry because the central holding of *Penn Central* is that the single "parcel" in that case could not be "divide[d] . . . into discrete segments." *Id.* at 130. Since

such segmentation of a parcel is impermissible, it is critical to identify what the "parcel" is.[11]

This Court has never definitively explained how the non-segmentable "parcel" should be identified, describing this as a "difficult, persisting question." *Palazzolo*, 533 U.S. at 631. Having said that, this Court in *Lucas* offered an important suggestion: "The answer to th[e] difficult question" of identifying the relevant parcel "may lie in *how the owner's reasonable expectations have been shaped by the State's law of property*—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." 505 U.S. at 1016 n.7 (emphasis added). Respondent State of Wisconsin submits that this is the proper approach for identifying the relevant "parcel."

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[11] This Court has also identified a separate regulatory takings category: "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Such takings claims do not appear to implicate any need to specify the particular "parcel" at issue, given that *any* physical occupation—no matter how small a part of the property—constitutes that sort of taking. *Loretto*, 458 U.S. at 426–27; *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015).

B. The state-law focused approach that this Court suggested in *Lucas* is consistent with this Court's caselaw.

This Court has uniformly defined the "property" protected by the Takings Clause with reference to state law. "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Or, as this Court recently explained in *Stop the Beach*, "[g]enerally speaking, state law defines property interests." 560 U.S. at 707 (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

Examples from this Court's Takings Clause jurisprudence abound. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), this Court found that trade secrets were subject to protection under the Takings Clause because they were property under Missouri law. *Id.* at 1003–04. Similarly, in *Preseault v. I.C.C.*, 494 U.S. 1 (1990), this Court noted that rails-to-trails conversions may or may not require compensation depending on the nature of property rights under state law. *Id.* at 16 & n.9; *see also id.* at 20–23 (O'Connor, J., concurring); *accord Phillips*, 524 U.S. at 163–68 (1998). Most relevant here, this Court has described real property in terms of state law. *See Penn Central*, 438 U.S. at 130–31 (the city tax block designated as

the "landmark site" under New York law); *Lucas*, 505 U.S. at 1016 n.7 ("fee simple interest" under South Carolina Law).

While these cases did not explicitly adopt the approach to the "parcel" question suggested by *Lucas*, their uniform reliance on state law as defining property rights to begin with is entirely consistent with looking to the objectively reasonable expectations that this state law creates.

This Court's decisions dealing with Pennsylvania mining "estates"—*Mahon*, 260 U.S. 393, and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987)—illustrate the critical point that the *Lucas* approach requires looking at the property owners' objectively reasonable expectations as shaped by *all* of a State's laws. In *Mahon*, this Court held that the Kohler Act's prohibition on certain subsidence-causing mining was a taking, explaining that the right to mine the coal at issue was "a very valuable estate" under state law. 260 U.S. at 414. *Keystone*, in turn, dealt with the Subsidence Act, which prohibited similar subsidence-causing mining. The *Keystone* majority held that the Subsidence Act did not "take" the so-called "support estate" under Pennsylvania law. In explaining this conclusion, the *Keystone* majority deferred to "[t]he Court of Appeals, which is more familiar with Pennsylvania law than we are," in concluding that the support estate had no independent "value," except when paired with the mineral estate. 480 U.S. at 500–01. In contrast, the *Keystone*

dissent would have treated the support estate as a separate "parcel," given that it viewed the estate as "severable and of value in its own right" under Pennsylvania law. *Id.* at 514–15, 519–20 (Rehnquist, J., dissenting).

While these opinions reached arguably "inconsistent" results, *Lucas*, 505 U.S. at 1016 n.7, those differences can be explained by divergent *factual* understandings of objectively reasonable expectations under all of Pennsylvania's laws, disagreements that fit comfortably under *Lucas*. According to *Mahon* and the *Keystone* dissent, the estate was a "very valuable," "severable" property under state law. *Mahon*, 260 U.S. at 414; *Keystone*, 480 U.S. at 519–20 (Rehnquist, J., dissenting). It was thus objectively "reasonable," *Lucas*, 505 U.S. at 1016 n.7, for owners to view this estate as a separate "parcel."[12] In contrast, in the view of the *Keystone* majority, the support estate had no independent "value" under state law, except as it supported the mineral estate. 480 U.S. at 500–01. It would thus be objectively "reasonable," *Lucas*, 505

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[12] *See* Benjamin Allee, Note, Drawing the Line in Regulatory Takings Law: *How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 Fordham L. Rev. 1957, 1985 (2002) ("[*Mahon*] exemplifies the [*Lucas*] footnote seven approach."); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994) ("[The *Lucas*] footnote bears a striking resemblance to the *Keystone* dissent.").

U.S. at 1016 n.7, to treat the support and mineral estates as part of a single, non-segmentable "parcel."[13]

Notably, neither the *Mahon* Court, the *Keystone* majority, the *Keystone* dissent, nor any other opinion of this Court that Wisconsin is aware of has looked at factors outside of objectively reasonable expectations shaped by state law, such as the landowners' subjective plans for the property. *See infra* pp. 44–45.

C. The *Lucas* approach is particularly appropriate when dealing with land divided by lot lines under state law.

Applying the approach suggested by *Lucas* to land parcels is entirely sensible in light of the primacy of the States in defining the law of land subdivision. The creation, alteration and significance of lot lines is entirely a function of the law of the State where the land is located. *See generally Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378–81 (1977); *McKeen*, 9 U.S. (5 Cranch) at 32. Specifically, each State decides the manner in which lots are drawn, the process for changing lot lines, the legal sig-

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[13] *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 Ecology L.Q. 187, 217 n.191 (1997) (describing the majority's decision in *Keystone* as "consistent" with the *Lucas* approach).

nificance of lots being separately platted, the conditions under which lots "merge," and the like. *See supra* pp. 2–3, 7–8, 11–13.

Applying the *Lucas* approach would respect each State's choices in this sovereign area. Where the State has made the choice of providing, as a matter of state law, that separately platted land lots may be sold and developed without regard to any neighboring lots, then landowners' objectively "reasonable expectations" would naturally be that the lots are separate "parcels" for regulatory takings purposes. *See* Nat'l Ass'n of Home Builders Amicus Br. 8–11; Se. Legal Found. Amicus Br. 11–12; Mountain States Legal Found. Amicus Br. 16–17. On the other hand, when a separately platted lot is subject to a merger provision, *see infra* pp. 37–38, or has no value under state law except when paired with another lot, *Keystone*, 480 U.S. at 500–01, or is otherwise restricted with a relevant state law provision, then "reasonable expectations" would be that the lot is not a separate parcel. And, of course, each State has the sovereign right to make its own choices as to how and when to privilege lot lines, including adjusting its prior laws so long as it provides adequate protection for settled expectations that developed based upon preexisting law. Notably, the variety of different lot merger regimes surveyed above, some providing more protection for land lots than others, *supra* pp. 11–13, illustrates the States functioning as "laboratories for devising solutions to difficult legal problems" in this area. *Ariz. State Legislature v. Ariz. Indep. Redistricting*

Comm'n, 135 S.Ct. 2652, 2673 (2015) (citation omitted).

Adopting the *Lucas* approach for land lots would also avoid unpredictable, subjective, or idiosyncratic inquiries that are focused on the particular landowner. Some lower courts have determined the relevant "parcel" by looking at a hodgepodge of case-specific factors, such as the manner in which a landowner has treated the particular land, the landowner's development plans, and the land's purchase history. *See infra* pp. 43–44. These inquiries introduce disuniformity into the classification of land that is treated identically under state law. Given that regulatory takings analysis already lacks sufficient clarity, *see, e.g.*, Chamber of Commerce Amicus Br. 5–14; Cato Inst. Amicus Br. 6–12; Bruce A. Ackerman, *Private Property and the Constitution* 8 (1977); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 Loy. L.A. L. Rev. 955, 966 (1993); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006–07 (2003), permitting consideration of these unpredictable factors should be avoided. And while complicated questions in this area of law are bound to come up, the *Lucas* approach provides an *objective* test for undertaking this inquiry.

Finally, the approach suggested by *Lucas* would reduce the opportunities for strategic manipulation

by the parties. With regard to concerns about manipulation by the sovereign, *e.g.* Mountain State Legal Found. Amicus Br. 17, when the party engaging in the alleged taking is not the State itself—for example, if the case involves the Federal Government seeking to regulate private land located within a State—the *Lucas* approach provides a neutral baseline between the Federal Government and the property owner. And when the sovereign party is the State or one of its political subdivisions, *ex ante* state law would similarly foreclose opportunities for strategic manipulation by the State. *See Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 888 (D.C. Cir. 1999) (Williams, C.J, concurring in judgment) (citing Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381 (1993)). Indeed, if a State sought to change unexpectedly its state law treatment of land, without providing a grandfather clause to protect settled expectations under *ex ante* state law, this change could itself be challenged under the Takings Clause. *See Lucas*, 505 U.S. at 1027.

Nor would adopting the *Lucas* approach raise concerns about strategic behavior by landowners to "manufacture" takings claims. *See Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting). If a landowner secured state approval to subdivide property *after* the challenged provision had been enacted, this would not help in any takings case because the pertinent objective expectations are under *ex ante* state law. And

any subdivision that was approved by state authorities prior to the relevant regulation—for example, in a State where such subdivision created an objectively reasonable expectation that the lots could be sold and developed separately—would not be problematic. This would merely be the exercise of the landowners' rights, which would have been approved by the relevant state authorities.

II. Contiguous, Commonly Owned Land Lots Are One "Parcel" Under The Approach Suggested By *Lucas* Where—As Here—The Lots Are Merged Under State Law

A. Applying the approach suggested by *Lucas* to this case yields the straightforward conclusion that Lots E and F are a single parcel. As *Lucas* explained, takings law "has traditionally been guided by the understandings of our citizens regarding the content of . . . *the 'bundle of rights' that they acquire when they obtain title to property*." *Lucas*, 505 U.S. at 1027 (emphasis added). When Petitioners obtained title to Lot E in 1995, they were "charged with knowledge" that the Lot was subject to a preexisting merger provision that would trigger if Lot E was brought into common ownership with a contiguous substandard lot. Pet. App. A-16. Nevertheless, Petitioners acquired Lot E when they already owned Lot F.

It is thus clear that Petitioners' objectively "reasonable expectations" as "shaped" by Wisconsin law, *Lucas*, 505 U.S. at 1016 n.7, were that they took title

to a single merged parcel in 1995, not to two separate parcels. As the Wisconsin Court of Appeals correctly explained, Petitioners "never possessed an unfettered 'right' to treat the lots separately." Pet. App. A-17–18. As a direct result, Lots E and F are now a single parcel for purposes of any takings claim that Petitioners may wish to bring regarding this land, whether that challenge is against state restrictions on the development of substandard lots, as in the present case, or against some newly enacted Federal regulations that impact the usage of land situated on the Lower St. Croix River.

The Wisconsin Court of Appeals thus properly relied upon the Supreme Court of Wisconsin's decision in *Zealy*, in rejecting Petitioners' request to segment a single merged parcel into two separate parcels and then analyze the taking as to one of those parcels. Pet. App. A-12–18. *Zealy*, like *Penn Central*, held that it was inappropriate to "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," 548 N.W.2d at 532 (quoting *Penn Central*, 438 U.S. at 130), including where the landowner has a subjective expectation of a particular use of a segment, *id.* That principle governs this case because the lots merged into one parcel under state law when Petitioners acquired Lot E. Petitioners' claimed subjective desire to develop and sell the lots separately cannot be used to segment this merged parcel.

B. Petitioners make a series of meritless arguments in response to the straightforward conclusion that, in light of the merger provision, the lots are a single parcel for Takings Clause purposes.

First, Petitioners spend considerable energy arguing that *Penn Central* was about *segmenting* a single parcel, whereas, in their view, this case is about *aggregating* parcels. Pet. Br. 13–19; *accord* Wis. Realtors Ass'n Amicus Br. 4–8; Cato Inst. Amicus Br. 6; States of Nevada et al. Amicus Br. 4; Nat'l Ass'n of Home Builders Amicus Br. 11. But whether this case is about "segmentation" or "aggregation" depends entirely on whether the Petitioners' property is one or two parcels. And, as explained above, the Petitioners' objectively "reasonable expectations" as "shaped" by Wisconsin law, *Lucas*, 505 U.S. at 1016 n.7, are that the lots merged into a single parcel when Petitioners brought them into common ownership in 1995. *See supra* pp. 37–38. Accordingly, this is just another case, like *Penn Central*, where the property owners are improperly seeking to segment a single parcel.

Some of Petitioners' *amici* appear concerned with a rule aggregating multiple parcels when state law creates objectively reasonable expectations that the parcels are entirely separate. *See, e.g.*, States of Nevada, et al. Amicus Br. 3; Chamber of Commerce Amicus Br. 16–17. To the extent that some language in the Wisconsin Court of Appeals' decision could be read to require aggregation of contiguous real property in

all circumstances, Pet. App. A-11, such dicta was unnecessary to resolving the present case because the relevant property is a merged parcel. Notably, where aggregation of contiguous, commonly owned property is contrary to "reasonable expectations," as "shaped" by state law, such aggregation would indeed be inappropriate, as *Lucas* itself made plain. *See Lucas*, 505 U.S. at 1016 n.7; *id.* (describing as "extreme" and "unsupportable" the automatic aggregation approach adopted by the New York state court in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333–334 (1977)).

Second, Petitioners place reliance on the fact that "Lot E was created pursuant to the laws and procedures of Wisconsin." Pet. Br. 28; *see also* Wis. Realtors Ass'n Amicus Br. 11–20. But the "laws and procedures of Wisconsin" also include the merger provision that took effect in 1976, years *before* Petitioners placed Lots E and F into common ownership. It is *all* of Wisconsin's laws that "shape" property owners' objective "reasonable expectations." *Lucas*, 505 U.S. at 1016 n.7. Under that complete view of state law, the lots are one parcel. *Supra* pp. 14–18.

That Lots E and F were separately taxed by the St. Croix County Treasurer between 1995 and 2011, Pet. Br. 5, 9, does not lead to a different conclusion. There is no indication in the record that Petitioners informed the St. Croix County Treasurer in 1995 that adjacent Lots E and F were in common ownership and substandard, which are necessary predicates for lot

merger. When the Wisconsin courts conclusively determined that the two Lots had merged, *Murr I*, 796 N.W.2d at 844, the Treasurer began taxing the lots under one combined assessment. JA 22–23. In any event, tax treatment is not the touchstone. When two lots have merged under state law—such that they cannot be sold or developed separately—it would be objectively unreasonable for an owner to rely upon local tax classification. *See, e.g.*, *In re Application for Vacation of Part of A.A. Carlson's Plat*, 699 N.W.2d 254 (Wis. Ct. App. 2005) (unpublished table decision) (multiple platted lots did not become one parcel by being assigned a single tax identification number).

Finally, Petitioners wrongly suggest that the present case involves a challenge to the enactment of the lot merger provision itself. Pet. Br. 12 (referring to "the challenged ordinance"); *accord* States of Nevada, et al. Amicus Br. 17 (referring to "newly enacted legislation or decrees"). But a challenge to the enactment of the provision would look at the world as it was *on January 1, 1976*, *see District Intown*, 198 F.3d at 888 (Williams, C.J., concurring in judgment), in order to determine if the State took anything from landowners "that they [had] acquire[d] when they obtain[ed] title to property." *Lucas*, 505 U.S. at 1027. On January 1, 1976, the Murr parents owned only Lot E, while the plumbing company owned Lot F. JA 6. Under the grandfather clause, the Murr parents retained their right to continue to develop and sell Lot E as they could before January 1, 1976, consistent with their preexisting objectively reasonable expectations.

Murr I, 796 N.W.2d at 844. The merger provision merely provided that if anyone took title to both Lot E and another contiguous, substandard lot, this would "merge" the two substandard lots. *Id.*

The Murr parents could have challenged the enactment of this provision in 1976 as a regulatory taking as to Lot E, but such a challenge would have been far more limited than the takings claim in the present case. In light of the grandfather clause, what the Murr parents lost in 1976 was the practical ability to sell Lot E to buyers who only wanted to buy that Lot if they could also acquire contiguous, substandard lots, and thereafter develop and re-sell those lots separately. Assuming this diminished the resale value of Lot E in 1976 to some extent, that diminution would have been minor compared to the valuable, waterfront real estate still embodied in Lot E after 1976. JA 51–52. Critically, Petitioners in this case have *not* sought to bring such a limited takings claim based upon any alleged diminution of value of Lot E in 1976, as their parents' successors in interest. *See Palazzolo*, 533 U.S. at 626–30. Not only would such a challenge be clearly time-barred, *see* Wis. Stat. § 893.52, but it would be extremely unlikely to succeed because the Murr parents lost very little in 1976 in light of the grandfather clause.

Contrary to this understanding, Petitioners appear to believe that they can challenge a lot merger provision by voluntarily triggering it and then litigat-

ing the case on the fictitious assumption that the provision was enacted after their acquisition. As explained above, this is contrary to the objectively reasonable expectations of property owners who acquire lots that are subject to a preexisting merger provision. *See supra* pp. 37–42. In addition, this would create an obvious opportunity for "manufactur[ing]" takings claims. *Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting). Under Petitioners' theory, a landowner could purposefully trigger a lot merger provision and thereby obtain a windfall recovery from the State, even where the seller had been protected by a grandfather clause. This would leave many merger provisions subject to strategic attacks, thus needlessly frustrating the laudable goal of gradually phasing out substandard lots while protecting current owners through grandfather clauses.

III. Even If This Court Decides That A Multifactor Analysis Is Warranted, The Lots Here Are Still One "Parcel"

In determining the relevant "parcel" for regulatory takings purposes, certain lower courts look at some combination of factors, including the landowner's economic expectations, the degree of contiguity of the land, the date of acquisition, and the extent to which the land has been treated as a single unit. *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) ("economic expectations"); *Dist. Intown*, 198 F.3d at 880 ("the degree of contiguity, the dates of acquisition, the extent to which the parcel has

been treated as a single unit"); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (considering the dates of acquisition as part of "one unified . . . plan."); *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) ("treats the parcels as distinct economic units"). Wisconsin believes that such an idiosyncratic and subjective multifactor approach should be definitively rejected, especially if any of the factors could lead to non-uniform treatment of land that is parceled and regulated identically under state law. *See supra* p. 35. Instead, the proper approach is the one this Court suggested in *Lucas*.

If this Court disagrees and decides that a multifactor approach is warranted, the result here would be the same: Lots E and F are a single parcel for regulatory takings purposes.

First, Petitioners had no "economic expectations" for Lot E separate and distinct from their economic expectations for Lot F. *Forest Props.*, 177 F.3d at 1365. To the extent this "economic expectations" inquiry is an objective test—which would look to what reasonable landowners in Petitioners' position would expect—Petitioners could not possibly have had "economic expectations" of developing and selling Lot E separately from Lot F, as a matter of law. Given that Petitioners were "charged with knowledge of existing zoning laws," they took title to Lot E in 1995 with the understanding that this was not a "distinct, saleable, developable site." Pet. App. A-16.

And to the extent the "economic expectations" factor considers *subjective* expectations—even if contrary to what reasonable property owners would understand under state law—this only highlights the problematic nature of asking such questions in this area. *See supra* pp. 21–22, 35. But even as to such a subjective inquiry, the record lacks any indication of Petitioners' subjective "expectations" when they acquired Lot E. While the Murr *parents* may have purchased Lot F as "an investment" in the 1960s, JA 6, there is no support in the record for Petitioners' suggestion that they acquired Lot E in 1995 with the intent to develop and sell it separately from Lot F. Pet. Br. at 30. Petitioners' attempt to conflate the "purchase, use, and plans for Lot E" by the Murr parents, Pet. Br. at 30, with their own expectations for that land in 1995, is improper given that they are asserting their own rights, not their parents' rights, as their successors in interest. *Supra* pp. 42–43.

Second, Lots E and F are "contiguous," *District Intown*, 198 F.3d at 880, for the entire length of their longest side. JA 28.

Third, the "date[ ] of acquisition," *District Intown*, 198 F.3d at 880, for Lot E does not support the claim that the lots should be considered separate. Petitioners took title to Lot F in 1994 and then shortly thereafter took title to Lot E in 1995. JA 6. While Petitioners argue that their acquisition of "Lot E [was] completely independent from Lot F," Pet. Br. at 31, there is no indication in the record that this one-

year gap manifests an intention to treat the two lots separately.

Finally, Petitioners have "treated" the land as a single unit, not as two separate lots. *Dist. Intown*, 198 F.3d at 880; *Forest Props.*, 177 F.3d at 1365; *Lost Tree*, 707 F.3d at 1293. When testifying about their property, Petitioners drew no meaningful distinction between the two lots. One of the Petitioners, for example, characterized both lots together as a "family gathering place." R. 18:11.[14] She discussed the beach as a single beach, not two separate beaches: "The swimming is safe. There's no drop-offs, there's no current. You can feel comfortable watching your little great-nephews out there swimming and not worry about boat traffic and unsafe conditions." R. 18:11. Summarizing her understanding of the property, again with no distinction between Lots E and F, she testified: "And it's just a really great place to keep the family together now that mom and dad are gone." R. 18:11.

Petitioners claim that they use Lot E "completely independent[ly]" from Lot F. Pet. Br. at 31. But the record reflects that the two lots are used in tandem for family recreation. Lot F contains a cabin, and Lot E contains a propane tank for the cabin. R. 22:85. Lot E contains a volleyball court for use when guests stay at the cabin on Lot F. Pet. App. B-9; R. 22:103. And

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[14] Cites to the record refer to the record of the St. Croix County Circuit Court in *Murr v. Wisconsin*, No. 12CV258.

both lots have beach access to the same stretch of beach. R. 18:11. Simply put, Lots E and F are a single parcel of land.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

PETITIONERS' REPLY BRIEF ON THE MERITS

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTRODUCTION

In deciding this case below, the Wisconsin appellate court proclaims a

> well established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

Pet. App. at A-11 ¶ 20 (emphasis added). In its opposing briefs, Respondents do not even attempt to defend this extreme rule. Rather, the State of Wisconsin and St. Croix County avoid the Wisconsin rule, labeling it "dicta" as they seek to affirm the lower court "instead on the narrower grounds described herein." Brief for Respondent State of Wisconsin at 40; Brief for Respondent St. Croix County at 40-41.

As a starting point, the Court should agree with all the parties, as well as amici, that the Wisconsin rule is not supportable. *See, e.g*, Brief of the States of Nevada, et al. as Amici Curiae in Support of Petitioners; Brief of Amici Curiae National Association of Home Builders, et al. (persuasively setting forth significant policy concerns with the broad Wisconsin *per se* rule). The Respondents' choice to not defend the rule should be followed by the Court's reversal of the decision below. At a minimum, this Court should vacate the decision below and remand with direction from this Court regarding the correct rule. In this case, that should be applying the rule from *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 130 (1978), recognizing that the parcel as a whole to be used as the denominator in the takings inquiry is the full fee simple interest to the single parcel alleged to be taken. In this case, that is Lot E.

In avoiding the rule applied by the lower court, St. Croix County instead attempts to pull this Court into factual disputes that address the merits of the takings claim. For example, much energy is spent discussing the County's interpretation of its expert witness appraiser, and asserting that the Murrs have not really suffered much economic injury. Of course, the Murrs' appraiser sharply disagrees with the County's appraiser. The Murrs' appraisal shows a 90 percent decrease in value for Lot E, a decrease from $410,000 to $40,000. Joint Appendix (JA) 113-14. But such factual disputes regarding appraisal methods and the degree of economic impact are subjects properly left for determination on remand.

The question here is not the magnitude of economic injury, but what parcel of property should be considered the "relevant parcel" for applying the takings inquiry. The ultimate issue of whether, or not, there is a taking, or what level of economic impact has occurred, is not before the Court. Rather, the question presented is more narrow, *i.e.*, what parcel of land is to be considered in the takings analysis?

ARGUMENT

I

THE RELEVANT PARCEL IN THIS CASE IS "LOT E"

The Murrs allege a taking of only their investment parcel, vacant Lot E. They contend that Lot E is the relevant parcel for considering whether there has been a denial of all economically viable use, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or a taking based on the ad hoc, multi-factor analysis described in *Penn Central*.

In the Petitioners' opening brief, the Murrs demonstrated that this Court's "parcel as a whole" concept focuses on the entire single parcel. *Penn Central*, 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments."); *see* Petitioners' Brief on the Merits at 13-24. Focusing on the single parcel, the Court has rejected arguments to segment, or carve out, particular interests in property in order to find a taking of that specific and narrow interest.

Similarly, the Court has not favored the Wisconsin approach of aggregating nearby parcels held by the same owner, calling that approach extreme and unsupportable. *Lucas*, 505 U.S. at 1016 n.7. Rather, the standard rule derived from *Penn Central*, *Lucas*, and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), is that the Court focuses on the single parcel that comprises the entire fee simple interest.

Neither Wisconsin or St. Croix County mount an argument against that analysis. Rather, they contend that Lot E and Lot F are actually a single parcel, and that, ironically, it is the Murrs who are trying to segment that single parcel into two parcels. In Wisconsin's words:

> Petitioners' efforts to distinguish between segmenting a single parcel (which *Penn Central* prohibits) and aggregating separate parcels (which *Lucas* explained is "unsupportable") thus cuts entirely against their argument because this is a segmentation case, not an aggregation case.

Brief of Wisconsin at 26.

The argument hinges on two ideas. First, Wisconsin refers to *Lucas* footnote 7 where the Court suggested that the answer to defining the relevant parcel "may lie in how the owner's reasonable expectations have been shaped by the State's law of property." *Lucas*, 505 U.S. at 1016 n.7. Wisconsin submits that this "approach suggested by *Lucas* is the proper method for identifying the parcel." Brief of Wisconsin at 23.

Building on this theme, Wisconsin then contends that the "State's law of property" includes "all" of the State's property laws. Brief of Wisconsin at 31 ("as shaped by *all* of a State's laws") (italics by Wisconsin). Wisconsin points out that "all" of the State's property laws include the 1975 enactment of the ordinance that has triggered the alleged taking. As argued by Wisconsin:

> It is *all* of Wisconsin's laws that "shape" property owners' objective "reasonable expectations." *Lucas*, 505 U.S. at 1016 n.7. Under that complete view of state law, the lots are one parcel.

Brief of Wisconsin at 40.

This argument fails both legally and factually. The Murrs appreciate that Respondents do not dispute that the "single parcel" is the proper standard derived from *Penn Central*. Indeed, as discussed below, that should be the presumption. This is particularly true in a case such as this, where the claim involves ordinary real property, fee title to a residential lot. But the attempt to claim that Lot E and Lot F are legally and factually a single parcel, and therefore should be the

relevant parcel for takings purposes, is not persuasive and will not withstand scrutiny.

A. *Lucas* Footnote 7 Strongly Supports the Murrs' Position That the Fee Simple Title to Lot E Is the Relevant Parcel

In relying on footnote 7 of *Lucas*, Wisconsin quotes only the first part of the identified sentence, as follows:

> The answer to th[e] difficult question of identifying the relevant parcel "may lie in *how the owner's reasonable expectations have been shaped by the State's law of property.*"

Brief of Wisconsin at 23 (quoting *Lucas*, 505 U.S. at 1016 n.7 (italics added by Wisconsin)). But most significantly, the sentence continues to explain what the Court meant by the "State's law of property":

> . . . shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to *the particular interest in land* with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law.

Id. (Italics added.) By ignoring the second half of the sentence, the State badly misconstrued the phrase "the State's law of property." This Court did not suggest that "all" of Wisconsin zoning law is used to define the relevant parcel. Rather, the reference is to State law

that provides legal recognition and protection to a **particular interest in land**. In *Lucas*, the particular interest was fee simple title. That is the same interest in land that the Murrs assert. They own fee simple title to Lot E. JA 6 (verified complaint). As this Court recognizes, a fee simple is a particular property interest with a long history of protection.

Wisconsin likewise secures and protects the fee simple estate. Wis. Stat. § 700.02 (recognizing property interest in fee simple absolute); *Zillmer v. Landguth*, 69 N.W. 568, 569 (Wis. 1896) (suspending power of alienation is repugnant to fee simple estate and void); *In re Budd's Estate*, 105 N.W.2d 358, 362 (Wis. 1960) (holder of fee simple estate "can lawfully sell, transfer, convey, assign, mortgage or alien" the interest).[1]

Correctly understood, *Lucas* footnote 7 provides strong support that Lot E should be the relevant parcel in this case. That lot was lawfully created through a certified survey map recorded in 1959 as a separate, discrete, and independent legal parcel. JA 82. The Murrs' parents purchased the fee title in 1963. JA 6. As acknowledged in *Lucas*, and well supported in Wisconsin, the fee simple interest has a rich tradition of protection at common law. Accordingly, to the extent *Lucas* footnote 7 provides guidance to answer the relevant parcel question, that guidance points

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[1] To further underscore this protection, Wisconsin has enacted a new statute that provides that a political subdivision "may not prohibit or unreasonably restrict a real property owner from alienating any interest in real property." Wis. Stat. § 700.28 (enacted by 2015 Wisconsin Act 391) (effective Apr. 28, 2016). Under the new statute it appears that St. Croix County could not have stopped the Murrs from selling their interest in Lot E.

directly at identifying the relevant parcel as the fee simple interest in Lot E.

B. Lot E and Lot F Remain Today as Separate, Single, and Discrete Parcels

Respondents argue that Lots E and F are actually a single parcel today, and therefore the combined lots should be the standard, presumed, relevant parcel under *Penn Central*. That argument is based on a fiction. Those parcels have not been legally joined.

The 1975 ordinance is a *zoning measure* that restricts uses and defines minimum lot sizes.[2] It does not eliminate lot lines. It is a *land use ordinance* that precludes the sale and development of Lot E, but the lot lines that distinguish the two parcels remain in place.

To alter lot lines, Wisconsin has formal procedures to be followed. Specifically, when a lot is created by a certified survey map pursuant to Wis. Stat. § 236, and recorded pursuant to § 236.34(3), that land is required, for all purposes, to be described by reference to the recorded survey. The statute provides:

> When a certified survey map has been recorded in compliance with this section, the parcels of land in the map shall be, for all

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[2] If allowed to be developed, Lot E has approximately one-half acre of building area. Pet. at 5. The building site is located in the level area at the top of the bluff, far back from the shoreline. Pet. App. A-12 (residence could be built at the top of the bluff). This upper area is accessed by a paved road with several other homes on the neighboring parcels. JA 33; JA 51. The upper level area is serviced with electricity, natural gas, and telephone. JA 34. Despite having a very suitable building site, Lot E is defined as "substandard."

> purposes, including assessment, taxation, devise, descent, and conveyance, as defined in 706.01(4), described by reference to the number in the survey, lot or outlet number, the volume and page where recorded, and the name of the County.

Wis. Stat. § 236.34(3). Accordingly, for all purposes, including subsequent conveyance, Wisconsin law relies on the recorded survey to identify the lot. In this case, the survey does not reflect any elimination of the lot line between Lots E and F, nor the creation of a new, single parcel, as suggested by Respondents.

Wisconsin law allows the exterior boundaries of Lot E to be altered by a new certified survey map that is also recorded (Wis. Stat. § 236.34(1) (bm)), or the original certified survey map can be vacated by a court. As with other methods for altering lot lines, vacation of a certified survey map is by application of the owner. Wis. Stat. § 236.34(4). In addition, any order vacating a certified survey map must also be recorded. Wis. Stat. § 236.44.

Significantly, in the present case, there has been no recorded change to the boundaries of Lot E. This deficiency is significant. The whole purpose of the recording statutes is to track title to legally described parcels to facilitate conveyances and protect bona fide purchasers.

> The [Wisconsin] recording statute contemplates that relevant instruments will be properly filed so that the complete title history of a parcel can be quickly determined from the public record . . . .

In re Couillard, 486 B.R. 466, 472 (Bankr. W.D. Wis., 2012). This ensures a clear and certain system for conveyance of property. *Id.* *See also* Wis. Stat. § 706.08(1)(a).

> [T]he purpose of the recording statute is to render record title authoritative to protect a purchaser who relies on the record and is a purchaser in good faith and for valuable consideration.

Kordecki v. Rizzo, 317 N.W.2d 479, 482 (Wis. 1982). Here, there has been no recorded survey, deed, or other instrument to effectuate an actual modification of the legal description and geographic boundaries of Lot E. Accordingly, Lot E and Lot F, while restricted in use, remain as separate and distinct parcels.

It should be no surprise that the minimum lot size requirement does not actually alter the boundary lines of any specific parcel. A minimum lot size is a general zoning requirement that is enacted as a legislative policy. It regulates *the use* of existing lots. In contrast, the laws for dividing land into lots (such as subdivisions and certified survey maps), are administrative in nature. That process involves a specific application to the particular land being subdivided.

> Zoning regulates the use of land and buildings, the intensity (or density) of that use, and the bulk and height of structures involved. . . . Zoning governs the lots at a small scale, specifying the minimum criteria that lots must meet—usually just minimum size requirements. . . .

> The most important legal difference between zoning and subdivision is in the administration of the two regulatory programs. The change of zoning necessary for many new developments is typically an act of the local legislative body. . . . In contrast, the regulation of subdivisions is entirely administrative and involves comparing the proposed subdivision to standards set forth in adopted regulations.

13 Richard R. Powell, *Powell on Real Property*, § 79D.03[2] (Michael Allan Wolf ed., 2013). The 1975 enactment establishes policies and standards that restrict uses, but it is not a site-specific action that eliminates lot lines of particular parcels.

The inability of the 1975 ordinance to actually, or legally, eliminate lot lines is also revealed by the chain of title in the present case. Respondents point out that in 1982, the parents transferred title for Lot F (the cabin parcel) from their plumbing company and placed it in their personal names. Since title to Lot E (the investment parcel) was already in the parents' names, these adjacent parcels came under common ownership. *See* Brief of Wisconsin at 18 n.2. According to the argument advanced by Respondents, the lots should have merged, and the lot line separating the two parcels extinguished, at that time.

But after 1982, Lot F was conveyed *without including Lot E* as part of the conveyance. Specifically, in 1994, the parents conveyed the cabin parcel to their children, and they retained ownership of the investment parcel. If the parents' common ownership of both parcels between 1982 and 1994 eliminated the lot line, the cabin parcel could not have been

independently conveyed to the Murr children in 1994. Thus, regardless of common ownership, Lots E and F did not legally become a single parcel. As described above, the 1975 ordinance restricts use, but it does not alter boundary lines. An alteration of boundary lines needs to be accomplished through an administrative process specific to the particular property, something that has never occurred. The parents' 1994 conveyance may have violated the use restrictions of the ordinance, but it also confirms that Lots E and F remained separate parcels.[3]

In summary, the Respondents' primary argument is based on a fiction that Lot E and Lot F were formally converted into a single parcel. The Respondents were compelled to pursue that strategy because *Penn Central*, *Lucas*, and *Tahoe-Sierra* are clear that the relevant parcel for takings analysis purposes is the single parcel. Because Respondents cannot persuasively refute that contention, they resort to arguing that Lots E and F are a single parcel. But, as shown here, that argument fails on the law and the facts. Accordingly, the single parcel, Lot E, is the relevant parcel for the takings inquiry.

C. The Regulations Themselves Do Not Define the Relevant Parcel

According to Respondents, because the Murr children took title after the enactment of the

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[3] The characterization of Lots E and F as being "effectively merged" is also a tacit admission that the lots are not "actually" merged. Rather, the ordinance restricts use so that the lots cannot be independently sold or developed, but does not legally merge the lots. In other words, the two parcels are being treated by the ordinance as though they are one parcel, when in fact they are separate parcels.

ordinance, they could not have any reasonable expectation to independently sell or develop Lot E. After all, Lot E was now defined as "substandard," and its independent sale or development was prohibited. Of course, after seeking a final decision on how the ordinance would be applied, and also being denied a variance, it is likely true that the Murrs would not have any further expectation to independently sell or develop Lot E. *But that is the gravamen of the takings claim itself*—not a basis for defining "property."

The use restrictions challenged for takings liability cannot also define what "property interests" are at issue—the question here. If this were so, there could never be a taking (or even a takings claim) because the regulations would simply strip the owner of any protected property interest. To the extent pre-existing regulations and rules (and expectations based on them) help define the relevant parcel, the only proper place to look is to antecedent understandings outside of the challenged regulations. Traditional understandings of property law provide the primary lens and the primary expectation. The nature and timing of challenged regulations may be relevant to whether a taking occurs, but they cannot define the property subject to the analysis.

To the extent it is even relevant, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) undercuts the notion that changed expectations resulting from enactment of the challenged ordinance can define the takings claim, or the relevant parcel. Justice Kennedy, writing for the majority, framed the issue as follows:

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems

> to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment backed-expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

Palazzolo, 533 U.S. at 626. The Court strongly rejected that theory.

> Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme and unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627.

Under this precedent, the Murr siblings have the same right to seek compensation under the Takings Clause as their parents. Indeed, the transfer of title from the parents to the children vests the same property interest as was held by the parents. *Id.* at 629 (citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.2 (1987)). In the Murrs' case, that is the fee simple interest to Lot E.

> The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was

> possessed prior to the regulation. The State may not by this means secure a windfall for itself.

Id. at 627.

Here, the Murrs' parents purchased fee simple title to distinct and separate parcels. Inherent in that title is the right to sell, convey, or otherwise alienate the entire fee simple interest. As shown above, Wisconsin common law has long protected that right. *Zillmer*, 69 N.W. at 569; *In re Budd's Estate*, 105 N.W.2d at 362.

It is for this reason that the Murr family was "quite flabbergasted" to learn that the regulations precluded the ability to independently sell Lot E. *See* Petitioners' Brief on the Merits at 27; JA 93. To strip away that right, and claim that the Murr siblings could have no reasonable expectation because the restrictions were already enacted, is to put an expiration date on the Takings Clause, as described in *Palazzolo*.

The rationale in *Palazzolo* included consideration of the practical difficulties in filing a takings claim under the ripeness doctrine. Before filing a takings claim, a potential claimant must first secure a final decision of how the regulations will be applied. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This is not always easy to do, and typically involves substantial effort and time. *See, e.g.*, *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). In rejecting the "notice" rule, the *Palazzolo* Court explained:

> A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied . . . . It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to ripen were not taken, or could not have been taken, by a previous owner.

Palazzolo, 533 U.S. at 628. That is precisely the situation here. When the regulations were enacted in 1975, the Murrs' parents had no reason to apply for development at that time. It is undisputed that they were holding Lot E as an investment, and simply left the property vacant. Petitioners' Brief at 3-4; JA 89. The property remained vacant and, after it was passed down to the now grown children, they proceeded to apply for a variance and secure a final decision on how the restrictions would be applied. Petitioners' Brief at 7-8. Having reached the point of a ripe takings claim, they should not now be denied relief on the ground that their acquisition of title was post-enactment of the 1975 restrictions.[4]

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[4] Respondents also suggest that perhaps the minimum lot size requirement is a background principle of property law, and thus insulated from the takings inquiry. That notion was also clearly rejected in *Palazzolo*.

> It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment. . . . A regulation or common-law rule cannot be a background principle for some owners and not for others. A law does not become a background principle for subsequent owners by enactment itself.

(continued...)

Nor should the relevant parcel be defined by the very regulations challenged in the Murrs' takings claim. The relevant parcel is defined by traditional understandings of property law, understandings that are not based on the challenged regulation itself, but based on the protection of the particular property interest. In this case, that is the fee title to Lot E.

II

THIS COURT SHOULD CONFIRM THE PRESUMPTION THAT FEE TITLE TO EACH SINGLE PARCEL IS THE DENOMINATOR FOR THE TAKINGS ANALYSIS

Wisconsin points out that since the 16th century, English land holdings are defined by "metes and bounds" descriptions. And the "Greeks labeled boundaries as 'sacrosanct.'" Brief of Wisconsin at 3 n.2. Wisconsin even cites the Bible for the long pedigree of respect for boundary lines: "Do not move your neighbor's boundary stone . . ." *Id.* (citing Deuteronomy 19:14).

With those long-held underpinnings, this country employs a system of deeds, legal descriptions of physical boundaries, and recording that is critical to the ability to buy and sell property. Fee simple title is typically conveyed by deed, which includes a description of the property boundaries, either by metes and bounds, or by reference to "lot" or "block" of a recorded plat, or other legal descriptions that identify the geographic boundaries of the parcel. Those deeds are recorded and provide a system of title search that

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[4] (...continued)
Palazzolo, 533 U.S. at 629-30.

is necessary to modern title insurance and the efficient conveyance of property.

This system requires defining the interest in property. Defining the property interest includes the geographic dimensions, *i.e.*, boundary lines. Moreover, it is the full definition of the property interest that this Court explained constitutes the "parcel as a whole" in the regulatory takings analysis. Justice Stevens, writing for the majority in *Tahoe-Sierra*, explained:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. *See* Restatement of Property ¶¶ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole."

Tahoe-Sierra, 535 U.S. at 331-32.

This Court should continue to adhere to the significance of horizontal geographic boundaries. Vertical segmentation was rejected in *Penn Central*, where the air rights could not be carved out from the entire fee interest. Likewise, temporal segmentation was rejected in *Tahoe-Sierra* in favor of viewing the relevant property interest as the entire, full fee interest. Now, the Court has before it the horizontal interest, *the physical boundaries*. In the same manner as its prior rulings, the Court should rule again that the single parcel is the relevant parcel.

In light of *Penn Central* and *Tahoe-Sierra*, the Court should confirm that the standard rule, or

presumption, is that the entire defined property interest, including all its geographic and temporal dimensions, should be the parcel as a whole in the regulatory takings analysis. In the Murrs' case, that is Lot E.

By confirming the presumption, which is grounded in traditional concepts of property law and *Penn Central*, the Court offers guidance and some degree of predictability to property owners, regulators, and the lower courts. Because a presumption may be rebutted, courts and local governments retain some flexibility. In any particular case, landowners or government may argue that the peculiar facts and circumstances warrant some degree of segmentation or aggregation. However, the party seeking to segment a lesser interest, or aggregate other parcels, should have the burden of proof to show that the facts warrant such unorthodox treatment.

In order to overcome the presumption, the test should be the familiar principle of fairness and justice which underlies the Takings Clause. *Arkansas Game and Fish Commission v. United States*, __ U.S. __, 133 S. Ct. 511, 518 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).[5]

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[5] The amicus brief submitted by the United States argues that the relevant parcel should be determined on a case-by case basis, with ad-hoc consideration of a variety of factors. While that approach maintains flexibility, it does not provide guidance. Even the State of Wisconsin rejects that approach, calling it unpredictable, subjective, and a hodgepodge that produces dis-uniformity and lack of clarity. Brief of Wisconsin at 35.

III

FAIRNESS AND JUSTICE SUPPORT A DETERMINATION THAT THE MURRS' LOT E SHOULD BE THE RELEVANT PARCEL IN THIS CASE

There is no factual reason in this case to deviate from the standard rule that Lot E, as the single parcel alleged to be taken, should be the relevant parcel for the takings inquiry.

Lot E and Lot F were created as separate and distinct parcels. The Murr family acquired the parcels at different times, by different deeds, and for different purposes. Petition at 3-5. The parcels have never been developed together, and it is undisputed that the investment parcel, Lot E, remains vacant to this day. Petitioners' Brief at 3-4; JA 89.

Nor does the grandfather clause provide any reason to combine Lots E and F for purposes of the Takings Clause. Rather, the operation of the grandfather clause underscores the unfair treatment experienced by the Murrs.

The reason a grandfather clause exists is to provide relief to property owners when regulations change. A legal and conforming lot of record may be rendered an illegal building site by enactment of reduced minimum lot size requirements. To avoid the harsh result, a grandfather clause exempts legal pre-existing lots of record. As recognized by Respondents, without a grandfather clause, the regulating government would be subject to takings claims.

> Indeed, if a State sought to change unexpectedly its state law treatment of land,

> without providing a grandfather clause to protect settled expectations under *ex ante* state law, this change could itself be challenged under the Takings Clause.

Brief of Wisconsin at 36.

In the present case, the grandfather clause provides the relief necessary for many land owners. Lot E was a legal lot of record and, normally, it could be sold or developed under the grandfather clause exception. But here, the ordinance has an exception to the exception. Petitioners' Brief at 6; JA 77. If the owner of Lot E happens to also own the adjoining lot, then the grandfather clause does not apply. That is the Murrs' situation.

There is no reason that the grandfather clause should not apply generally. If the harsh treatment is sufficient to warrant a grandfather clause, then it should be applied to all owners holding pre-existing legal lots of record. It is fundamentally unfair, to have a rule that a lot may be purchased and developed by any person, except the owner of the neighboring land.

St. Croix County suggests that the Murrs can retain value in Lot E through development with Lot F. Perhaps that is true. Perhaps a larger house, an estate, with substantial beach frontage derived from both lots, and more privacy, might be attractive to some people. But such assertions about potential economic values go to the merits of a takings claim, or to the level of compensation. Perhaps the economic impact to Lot E is not the 90 percent decrease in value determined by the Murrs' appraisal (JA 113-14), but is something less. That battle between experts, however, is a factual dispute that may be resolved on remand.

At bottom, there is no reason to depart from the standard rule that the single parcel alleged to be taken, Lot E, is the proper unit for the takings inquiry.[6]

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[6] Amici WISCONSIN COUNTIES ASSOCIATION, et al., raise several inapt procedural arguments. They argue that (1) this Court should decline to address the constitutional "relevant parcel" question because independent state law grounds offer a basis to resolve the underlying dispute and/or because (2) the Murrs' federal takings claim is not "ripe" for review. However, the parties have raised neither of these issues and the courts below did not pass on them. They are therefore not before this Court. *F.T.C. v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010, n.4 (2013) ("Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.").

In any event, Amici's arguments are devoid of merit. As to the first argument, this Court long ago held that issues decided under federal law are justiciable here even where it is asserted that state law might provide an alternative basis for deciding the issues. *See Orr v. Orr*, 440 U.S. 268, 276-77 (1979) ("Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground.").

As to the ripeness argument, there is no dispute here that Respondent County formally denied the Murrs' request for a variance allowing the use of their lot. This establishes the finality necessary to ripen a federal takings claim. *See Williamson County*, 473 U.S. at 190-94 (takings claim typically ripens upon unsuccessful application for a variance, if one is available); *Palazzolo*, 533 U.S. at 620-21.

IV

CONCERN FOR SO-CALLED MERGER ORDINANCES IS OVERSTATED

Many jurisdictions have various forms of "merger" ordinances. Each has its own characteristics, grandfather clause provisions, and levels of participation by the landowners. In many cases, it is the owner who wants to merge adjoining parcels to create a better building site. Often lots are simply too small to develop, and they need to be combined to create reasonable building sites. *See, e.g., Island County v. Dillingham Development Company*, 662 P.2d 32 (Wash. 1983).

Although the present case addresses only the "relevant parcel" question, and not the merits of the takings claim, the Court should not be concerned with opening the proverbial floodgates to a rush of takings claims involving merger provisions. As Respondents argue, various forms of merger ordinances have been around for a long time. Some have been found to result in a taking of particular properties. *See e.g. Negin v. Board of Building and Zoning Appeals of City of Mentor*, 433 N.E.2d 165, 169 (Ohio 1982). But there has not been a rush of takings claims.

> Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the

> Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases.

Arkansas Game and Fish, 133 S. Ct. at 521. Finding that Lot E is the relevant parcel, thereby following *Penn Central* and *Tahoe-Sierra*, will also not cause the sky to fall. *Id.*

CONCLUSION

The Court is urged to hold that when evaluating a taking claim for a single parcel, *Penn Central* establishes a presumption that the relevant parcel to measure the degree of interference is the single parcel. In this case, there is no persuasive reason to overcome that presumption. Accordingly, the relevant parcel is Lot E.

DATED: July, 2016.

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RECORD AND BRIEFS

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In the Supreme Court of the United States

JOSEPH P. MURR, ET AL., PETITIONERS

v.

STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF WISCONSIN, DISTRICT III

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

A county ordinance prevents the separate sale or development of commonly owned, contiguous lots abutting the St. Croix River that are considered substandard because they do not meet minimum area and river-frontage requirements for independent development. Decades after the ordinance was enacted, petitioners acquired two contiguous substandard lots that are subject to the ordinance.

The question presented is whether the Wisconsin Court of Appeals erred in considering the two lots together as the relevant "parcel as a whole" in rejecting petitioners' claim that the ordinance effected a regulatory taking.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns whether adjacent lots under common ownership should be considered together when analyzing whether an exception to a grandfather provision in a zoning law resulted in a regulatory taking. Various Acts of Congress authorize federal agencies to regulate the permissible uses of privately-owned real property, or for States to carry out such programs pursuant to federal standards. The United States therefore has a substantial interest in the proper application of the Just Compensation Clause to such regulatory efforts. In addition, the property at issue in this case abuts a river designated under the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, and the county ordinance alleged to effect a taking was designed to protect the river.

STATEMENT

1. a. The Wild and Scenic Rivers Act created the National Wild and Scenic Rivers System (WSRS) to manage and protect "certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. 1271. Those rivers and "the related adjacent land" are administered "to protect and enhance the values" for which they were included in the WSRS, with "primary emphasis" on "esthetic, scenic, historic, archeologic, and scientific features." 16 U.S.C. 1273(b), 1281(a).

Congress initially selected eight rivers to include in the WSRS, including the first 112 miles of the St. Croix River, which originates in northwest Wisconsin and then traces the border between Wisconsin and Minnesota. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 3(a)(6), 82 Stat. 908 (16 U.S.C. 1274(a)(6)); 40 Fed. Reg. 43,245 (Sept. 19, 1975). In 1972, Congress authorized the addition of the lower leg of the St. Croix River, which continues an additional 52 miles along the Wisconsin-Minnesota border before joining the Mississippi River. See Lower St. Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174 (16 U.S.C. 1274(a)(9)); 40 Fed. Reg. at 43,245. Congress "found that the Lower St. Croix River and its immediate environment possess outstanding scenic and esthetic, recreational, and geologic values" and that the area "should be protected for the benefit and enjoyment of present and future generations." 40 Fed. Reg. at 43,244.

b. Wisconsin manages the land along the stretch of the St. Croix River at issue in this case. 41 Fed. Reg.

26,236 (June 25, 1976); see 16 U.S.C. 1273(a) (providing for state administration of WSRS rivers under specified circumstances). The "overall goal" of river management is "to preserve the existing scenic and recreational resources * * * through controlled development." 40 Fed. Reg. at 43,244. Because "sound local zoning ordinances" are "essential" to achieving that goal, *id.* at 43,253, Wisconsin's legislature directed the State's Department of Natural Resources (DNR) to set minimum standards "for local zoning ordinances which apply to the banks, bluffs and bluff tops of the lower St. Croix River." Wis. Stat. Ann. § 30.27(2)(a). Those standards recognize that residential development "poses the greatest single threat to maintaining a pleasant and scenic river environment." 40 Fed. Reg. at 43,246.

The property at issue in this case abuts a "rural residential" portion of the St. Croix River, which is a "primarily natural" area of "low-density" development with "large lots." Wis. Admin. Code NR (NR) § 118.04(4)(a); see Wis. C.A. R. (R.) 22-102. Under regulations that became effective in 1976, riverfront lots in the rural-residential zone may serve as building sites only if they have at least 200 feet of river frontage and at least one acre of "[n]et project area," defined as "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands," NR § 118.03(27); see *id.* § 118.06(1)(a)(2)(A) and (c)(3). No "more than one single-family residence" may be built on a lot that complies with those requirements. *Id.* § 118.06(1)(b).

A lot that does not meet the minimum size requirements is considered "[s]ubstandard" and generally may not "be used as [a] building site[]." NR

§§ 118.03(48), 118.06(1)(a). DNR provided an exception, however, by grandfathering substandard lots that were "of record in the register of deeds office on January 1, 1976," *id.* § 118.08(4), the effective date of the restrictions, see *id.* § 118.05(1) and (5) (1975). Under the grandfather provision, preexisting substandard lots "may be allowed as building sites" if they are "in separate ownership from abutting lands." *Id.* § 118.08(4)(a)(1). But a so-called merger provision provides that "[a]djacent substandard lots in common ownership" may not "be sold or developed as separate lots" unless "each of the lots has at least one acre of net project area." *Id.* § 118.08(4)(a)(2).

A landowner who wishes to build on a substandard lot that does not meet the requirements of the grandfather provision may seek a variance from the local zoning authority. NR § 118.09(4)(b). A variance may be granted to address an "unnecessary hardship" arising from "special conditions." *Ibid.* "Economic considerations alone may not constitute a hardship," however, "if a reasonable use for the property exists under the conditions allowed by the local zoning ordinance." *Ibid.*

Local zoning ordinances must incorporate DNR's minimum standards for development in the protected St. Croix River area. Wis. Stat. Ann. § 30.27(3). As relevant here, St. Croix County (County) and the unincorporated Town of Troy, which is located in the County, administer and enforce development restrictions identical to those mandated by DNR. See County Ordinance § 17.36; Pet. App. B3.

2. a. Petitioners are four siblings who jointly own 2.52 acres of property along the St. Croix River in the Town of Troy. Pet. App. B1. The property, which is

part of the St. Croix Cove subdivision, "is bisected by a steep 130 foot bluff" but "is moderately level at the top and also below at the river level." *Id.* at B1-B2. "[A]n unrecorded subdivision map" splits petitioners' land into "Lot E" and "Lot F," *id.* at A2 n.1, with the dividing line running from the river's edge to the blufftop, *id.* at A3. See J.A. 28 (St. Croix Cove Plat Map).

Lots E and F are substandard because they do not satisfy the minimum net-project-area and river-frontage requirements to serve as building sites under the DNR regulations and county ordinance. While Lots E and F are each "approximately 1.25 acres" in size, Pet. App. B2, their combined net project area is only 0.98 acres due to topographic constraints, *id.* at A3. Lot E has only 100 feet of river frontage and Lot F has only 58 feet. J.A. 27; R. 17-117. The subdivision homeowners' association owns an adjacent beach that "takes a notch out of [Lot F] * * * and cuts down on the frontage" of that lot. J.A. 51.

On July 21, 1959, the County register of deeds recorded a single lot encompassing what are now Lot E, Lot F, and a landlocked tract on the other side of Lot F known as "Lot G." See R. 17-123; see also J.A. 28. On July 27, 1959, the register recorded a separate lot encompassing only Lot E, thereby subdividing the prior lot. See R. 17-124 to 17-125. In 1962, the register recorded a portion of what is now Lot F, known as the "Boathouse" parcel, which juts into Lot G. See R. 17-126. The record does not show whether the rest of Lot F was ever recorded independent of Lot G.

Petitioners' parents purchased Lot F in 1960. J.A. 117; Pet. App. A3. In 1961, they conveyed that area to their family plumbing company. *Ibid.* In the mid-

1960s, petitioners' parents acquired Lot E and the Boathouse parcel in their own names. *Ibid.*; see R. 22-67. In 1982, the rest of Lot F was transferred from the plumbing company to petitioners' parents. See R. 17-127, 22-84; see also Wisconsin Br. 18 n.9; County Br. 11 & n.5.[1]

In 1994, petitioners' parents conveyed Lot F to petitioners as joint tenants. R. 17-112; see Pets. Br. 4 (describing conveyance as a gift). In 1995, petitioners' parents conveyed Lot E to petitioners as joint tenants. R. 17-113. That second conveyance, which occurred long after the merger provision was enacted, brought the lots under petitioners' common ownership. Pet. App. A3.

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[1] Although petitioners state (Br. 30) that their parents purchased Lots E and F "in completely distinct transactions" separated by several years, an examination of the public records maintained by the County Registers Office indicates some uncertainty about the nature of the conveyances. The public deed for the initial acquisition in 1960, which is not in the certified record, indicates that petitioners' parents were purchasing a unified parcel containing all the land comprising Lots E, F, and G. Warranty Deed No. 265,236 (recorded May 8, 1961); see *United States* v. *Teschmaker*, 63 U.S. (22 How.) 392, 404-405 (1860) (taking judicial notice of land-title records); see also *Massachusetts* v. *Westcott*, 431 U.S. 322, 323 & n.2 (1977) (taking judicial notice of Coast Guard records). But the transferors had previously conveyed Lot E to third parties. Warranty Deed No. 260,460 (recorded Dec. 29, 1959). In 1961, petitioners' parents purported to transfer a unified parcel containing Lots E, F, and G to their plumbing company. Warranty Deed No. 265,237 (recorded May 8, 1961). In the mid-1960s, petitioners' parents separately acquired Lot E and the Boathouse portion of Lot F in their own names. Warranty Deed No. 277,337 (recorded Aug. 25, 1964) (Boathouse parcel); Warranty Deed No. 283,267 (recorded Feb. 1, 1966) (Lot E). In 1982, they reacquired the rest of Lot F from their plumbing company. Warranty Deed No. 378,007 (recorded June 8, 1982).

There is presently a "recreational cabin" on Lot F and an "outbuilding" on the Boathouse parcel. Pets. Br. 3; J.A. 34; see R. 17-127. There are no permanent structures on Lot E, but a survey map filed in March 2006 depicts a volleyball court on Lot E next to the cabin on Lot F. R. 17-127.

b. In 2006, petitioners applied for several variances from the County Board of Adjustment (Board). Initially, petitioners sought to "redivide the lot line[s]," creating one lot above the bluff that they could sell and one lot below the bluff that they could retain. R. 22-134; see County Br. 14 n.7. Petitioners subsequently revised their application, eliminating the request to redraw the lot lines and instead seeking to "subdivid[e] their property, sell[] the portion contained in Lot E and build[] a residence outside of the existing cabin's footprint on Lot F." Pet. App. B4; see County Br. 14 n.7.

The Board denied petitioners' request. J.A. 61-63. As relevant here, the Board found that the denial of a variance to separately develop or sell the substandard lots "would not constitute an unnecessary hardship because it would not deprive [petitioners] of reasonable use of their property." J.A. 65. The Board emphasized that petitioners could develop or sell the property "as a single, more conforming parcel that is more suitable for residential development." *Ibid.* And the Board further noted that a variance was not "necessary to secure to [petitioners] similar rights [as] neighboring landowners," because "[a]t least eight other property owners in the immediate * * * area own one or more contiguous substandard lots along the river with just one building site." J.A. 67. The Board observed as well that the merger provision

"protect[s] existing property owners and the general public from the adverse [e]ffects of overcrowding and poorly planned development" in the protected river area. *Ibid.* Accordingly, the Board concluded, "[g]ranting th[e] variance would not meet the spirit and intent" of the merger provision. J.A. 65.

c. Petitioner Donna Murr filed suit against the Board in state court, arguing, as relevant here, that the regulatory restriction on separate sale and development did "not apply to merge her two contiguous parcels, because the parcels did not come under common ownership until after the [merger provision's] effective date." *Murr* v. *St. Croix Cnty. Bd. of Adjustment*, 796 N.W.2d 837, 843 (Wis. Ct. App.), review denied, 803 N.W.2d 849 (Wis. 2011) (Tbl.).

The Wisconsin Court of Appeals rejected that interpretation of the merger provision because it would undermine the "manifest intent of the [regulations] to preserve property values while limiting environmental impacts." *Murr*, 796 N.W.2d at 843-844. The court observed that the grandfather provision allows "every person who already owned a lot" to "build on their lot or sell it as a developable lot" regardless of size. *Id.* at 844. But applying that exemption to subsequent owners of adjacent substandard lots would frustrate the law's environmental purpose, "with no countervailing property value concern." *Ibid.* The court emphasized that petitioner was "charged with knowledge of the existing zoning laws" and, unlike preexisting owners, "had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot." *Ibid.* The court accordingly affirmed the Board's decision, *id.* at 840, noting that petitioner did not contend that she was entitled to a hardship variance if

the merger provision applied to her property, *id.* at 842 n.7.

d. In 2012, petitioners filed this suit in state court, alleging that the Board's denial of a variance constituted a taking requiring compensation. J.A. 9-10.

The trial court awarded summary judgment to respondents. Pet. App. B1-B10. Viewing "the property in question as a whole," *id.* at B8, the court observed that petitioners retained "several available options" for "recreational and residential use of the property despite the denial of the variance," *id.* at B9. Although only one home could be built on the merged lot, that residence "could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." *Ibid.* The court further noted that petitioners "have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball" on Lot E. *Ibid.* The court also explained that the market value of the property was not "significantly impacted by the denial of [a] variance to separately sell or develop the lots," noting the conclusion of respondents' appraiser that there was "less than a ten percent difference" in the market value of petitioners' property as a unified parcel with one building site, compared to its value as two separate, buildable lots. *Ibid.* The court accordingly concluded that there was no regulatory taking.

e. The Wisconsin Court of Appeals affirmed, concluding that petitioners had "not alleged a compensable taking as a matter of law" even with "all pertinent facts and reasonable inferences from those facts [viewed] in the light most favorable to [them]." Pet. App. A2, A18.

The court of appeals rejected petitioners' argument that "there is a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis." Pet. App. A9. The court observed that the ordinance had "effectively merged [petitioners'] two adjacent, riparian lots," *id.* at A1-A2, and it concluded that petitioners' "contiguous property" was not "analytically divisible for purposes of a regulatory takings claim," *id.* at A9. The court "disagree[d]" that any alleged "expectation of separate use" for Lots E and F could justify considering them in isolation. *Id.* at A17 n.8. "A property owner's subjective, desired use," the court reasoned, cannot "determin[e] the extent of the property at issue for purposes of a regulatory taking." *Ibid.*

The court of appeals drew support for its conclusion that Lots E and F should be considered together from *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996). Pet. App. A9-A11. There, the Wisconsin Supreme Court had relied on the "historical formulation of the takings inquiry," as well as "practical considerations," to reject a landowner's attempt to "segment [his] property" so as to isolate the portion directly affected by a restriction. *Id.* at A10. Applying *Zealy*, the court of appeals concluded that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Id.* at A11.

Focusing on the "property as a whole," the court of appeals held that no taking had occurred. Pet. App. A12. It first rejected petitioners' contention that the merger provision "deprive[d] [them] of all or substantially all practical use of their property." *Id.* at A2.

The court explained that "[t]here is no dispute that [petitioners'] property suffices as a single, buildable lot," with the possibility of erecting a home on Lot E, Lot F, or a combination of the two. *Id.* at A12. The court concluded that petitioners' "ability to use Lot E for residential purposes, standing alone, is a significant and valuable use of the property." *Id.* at A13.

The court of appeals also rejected petitioners' "oblique[] suggest[ion] that * * * a partial taking has occurred" under the "ad hoc factual, traditional takings inquiry." Pet. App. A14 (citation omitted). The court found no genuine issue of material fact regarding the economic impact of the regulation, which the trial court had concluded decreased the property's value by less than ten percent. *Id.* at A15-A16. The court of appeals further determined that petitioners had no reasonable, investment-backed expectation of selling or developing Lots E and F separately. *Id.* at A16-A17. The court emphasized that the merger provision "was on the books for nearly two decades before [petitioners] became the common owners of Lots E and F," and that they "presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger" of the lots. *Ibid.* Because petitioners "never possessed an unfettered 'right' to treat the lots separately," the court concluded that any "expectation of separate treatment" was "unreasonable." *Id.* at A17-A18 (citation and internal quotation marks omitted). Finally, "the nature and character of the government action" also weighed against a taking, given the "strong public interest in preventing degradation of the natural environment" and the regulation's aim of

"preserv[ing] property values while limiting environmental impacts." *Id.* at A14-A15 (citation omitted).

SUMMARY OF ARGUMENT

The Wisconsin Court of Appeals correctly considered the merger provision's impact on Lots E and F together in rejecting petitioners' regulatory-takings claim.

A. 1. Principles of fairness and justice help to identify the relevant property against which to measure the impact of a regulation in a regulatory-takings case, just as those concepts animate the Just Compensation Clause more generally. In line with this Court's avoidance of per se rules in this context, various factors may properly inform the determination of the parcel as a whole.

The factors that bear on that determination in cases involving real property may be categorized along the three dimensions that identify the relevant interests of an owner in land—spatial, temporal, and functional. Spatial considerations provide the natural starting point. In particular, commonly owned, contiguous land should often sensibly be considered as one unit in the particular regulatory context. Temporal considerations account for the history surrounding the owner's acquisition of the property and the relation of that timing to the enactment of the challenged regulatory restriction. Functional considerations include the owner's use of the property, his objectively reasonable expectations, and whether the property is linked through development plans or a reciprocity of advantage.

2. Petitioners' and Wisconsin's argument that state lot lines should carry dispositive or presumptive weight in evaluating a regulatory-takings claim is

unavailing. This Court has previously rejected the argument that the "legalistic distinctions" established by state property law dictate the relevant parcel. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 500 (1987) (*Keystone*). And there is no reason to think that the considerations that inform a locality's decision to approve a subdivision of land necessarily correspond to the factors that guide a determination whether multiple lots should be viewed as a more integrated whole for purposes of a regulatory-takings analysis.

B. 1. Spatial, temporal, and functional considerations establish that Lots E and F should be considered together in assessing the impact of the merger provision. The commonly owned lots are contiguous and feature the same topography. They were acquired close in time, and petitioners combined the lots by bringing them under common ownership long after the merger provision was enacted. And as petitioners' experience demonstrates, the entire area may be used as an integrated whole, with privacy and additional recreational space provided by the unified parcel.

2. The merger provision's state-law effect of binding Lots E and F together provides an additional reason to consider the economic impact on the whole of petitioners' property. The merger provision does not bar the sale or development of Lot E, but only conditions those actions by linking them to Lot F. Any analytically coherent attempt to value what petitioners have lost in being unable to separately sell or develop Lot E must therefore also account for what they have gained by merging their land into one larger parcel. This Court took that approach in *Penn Central Transportation Co.* v. *New York City*, 438

U.S. 104 (1978) (*Penn Central*), holding that a regulatory restriction's allowance of transferable development rights to be used on the owner's neighboring properties must "be taken into account in considering the impact of [the] regulation." *Id.* at 137.

3. Petitioners' arguments that Lot E should be isolated from Lot F when considering the effect of the merger provision lack merit. Petitioners are wrong to invoke whatever effect state law would otherwise give to the boundaries for their substandard lots, while ignoring the state law merging those boundaries, which petitioners triggered by bringing the lots under common ownership. Their contention that they subjectively expected to treat Lots E and F as distinct parcels contradicts the record and was in any event objectively unreasonable once they voluntarily merged the lots. And their acquisition of the lots in two transactions a year apart does not overcome the many factors linking those lots and demonstrating that they are fairly and justly treated as one parcel as a whole.

ARGUMENT

THE WISCONSIN COURT OF APPEALS CORRECTLY CONSIDERED THE IMPACT OF THE MERGER PROVISION ON LOTS E AND F TOGETHER IN REJECTING PETITIONERS' REGULATORY-TAKINGS CLAIM

The Fifth Amendment's Just Compensation Clause, made applicable to the States through the Fourteenth Amendment, see *Penn Central*, 438 U.S. at 122, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The purpose of the Clause is to ensure that the government does not "forc[e] some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). A per se rule of compensation is warranted for permanent physical appropriations because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Until this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the [Just Compensation] Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted; second set of brackets in original). The Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a taking if it is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537.

In particular, the Court held in *Lucas* that a regulation that results in "the complete elimination of a property's value" may constitute a total taking. *Lingle*, 544 U.S. at 539. The Court explained that, "from the landowner's point of view," such a "total deprivation" is "the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. A regulation may also be found to effect a taking under the "ad hoc, factual inquir[y]" set forth in *Penn Central*. 438 U.S.

at 124. The *Penn Central* standards involve a "careful examination and weighing of all the relevant circumstances," *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring), including the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action," *Penn Central*, 438 U.S. at 124. The *Lucas* and *Penn Central* standards "share a common touchstone" of "identify[ing] regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

In analyzing regulatory-takings claims, the Court has "remain[ed] cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good.'" *Lingle*, 544 U.S. at 538 (quoting *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979)). "Zoning laws" like the one at issue in this case are "the classic example" of a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124-125; see *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (recognizing the uniform judgment that zoning laws are valid to address "the evils of over-crowding and the like"). Apart from serving important public purposes, these regulations "secure[] an average reciprocity of advantage" within the community that benefits affected property owners. *Mahon*, 260 U.S. at 415; see NR § 118.01 (deeming development restrictions in the protected St. Croix River area "necessary * * * to maintain property values").

The Court has further recognized that to require compensation whenever a generally applicable law "curtails some potential for the use or economic exploitation of private property * * * would effectively compel the government to regulate by purchase." *Allard*, 444 U.S. at 65 (emphasis omitted). But "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. To succeed on a takings claim, then, a property owner must show that he has been subject to a "deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone*, 480 U.S. at 493.

A. Identification Of The Relevant Property Against Which To Measure Impact In A Regulatory-Takings Case Requires Consideration Of A Variety Of Factors

To assess the effect of government regulation on an owner's property rights, courts considering a regulatory-takings claim must identify "the relevant mass of property" against which to measure the regulation's economic impact on investment-backed expectations and to provide context for assessing the nature of the governmental action—what is known in shorthand as the "parcel as a whole." *Keystone*, 480 U.S. at 497. The Court has "consistently rejected" the "circular" approach of "defining the [relevant] property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (*Tahoe-Sierra*). Thus, a property owner may not divide his entire parcel into discrete parts—"whether limited by time, use, or space," *id.* at 319 (summarizing court of appeals' decision)—in order

to allege a total taking of one of those parts. See *id.* at 331 (error to "disaggregate[] [claimants'] property into temporal segments"). Instead of "divid[ing] a single parcel into discrete segments and attempt[ing] to determine whether rights in a particular segment have been entirely abrogated," the Court focuses "on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-131.

1. In identifying the relevant property to consider when assessing a takings claim, principles of fairness and justice serve as the polestars, just as they animate the Just Compensation Clause more generally. See *Armstrong*, 364 U.S. at 49. Because those concepts "are less than fully determinate," the Court has recognized the virtue in "examin[ing] a number of factors" instead of attempting to prescribe "a simple mathematically precise formula" to govern the takings inquiry. *Tahoe-Sierra*, 535 U.S. at 326, 336 (internal quotation marks omitted). There are numerous types of interests in property and a "nearly infinite variety of ways in which government actions or regulations can affect [those] interests." *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). Courts require flexibility to consider those circumstances that "are probative of what fairness requires in a given case." *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). A variety of factors therefore may properly bear on determination of the relevant property, with the ultimate goal of "identify[ing] the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti* v. *United States*, 22 Cl. Ct. 310, 319 (1991).

In cases involving real property, the factors relevant to the parcel-as-a-whole determination are appropriately grouped into three categories—spatial, temporal, and functional—which reflect the dimensions of a property owner's interests in land. See *Tahoe-Sierra*, 535 U.S. at 327, 331-332 (analyzing the temporal dimension, and recognizing that property owners also have interests in the various uses of their property and the "metes and bounds that describe its geographic dimensions"); see also *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000) (further describing those categories), aff'd, 535 U.S. 302 (2002).

Spatial considerations provide the natural starting point—and, quite often, the end point—for the inquiry. In particular, commonly owned, contiguous land will often form one relevant unit of property in the context of a particular regulation. See, *e.g.*, *Giovanella* v. *Conservation Comm'n*, 857 N.E.2d 451, 457-459 (Mass. 2006), cert. denied, 549 U.S. 1280 (2007); *Bevan* v. *Brandon Twp.*, 475 N.W.2d 37, 43 (Mich. 1991), cert. denied, 502 U.S. 1060 (1992). The temporal dimension encompasses the "term of years that describes * * * the owner's interest," *Tahoe-Sierra*, 535 U.S. at 332, including the dates when an owner acquired the property immediately affected and any larger tracts with which it is associated, as well as the relation of that timing to the application of the regulatory regime. And the functional dimension includes the use to which the owner has put the property, the owner's objectively reasonable expectations regarding the property, whether the property is linked through an identified or implicit development scheme, and the extent to which regulated portions of

land are integrated with and enhance the value of unregulated portions. See, *e.g.*, *District Intown Props. Ltd. P'ship* v. *District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999), cert. denied, 531 U.S. 812 (2000); *Giovanella*, 857 N.E.2d at 457-458 (collecting cases discussing those factors and others).

Contiguity plays an important role in the parcel-as-a-whole analysis because it frequently corresponds to other factors demonstrating that, in fairness and justice, commonly owned tracts of land should be considered together in assessing the takings claim. For example, contiguous lots will frequently benefit from a direct reciprocity of advantage, with regulated segments enhancing the value and use of unregulated portions. And often "[c]ommon sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property." *Giovanella*, 857 N.E.2d at 458. Yet no bright-line rule requires aggregation of contiguous, commonly owned land in *all* cases, even those in which the history and use of the property demonstrate that the regulation's impact should be assessed on separate parcels. "The temptation to adopt what amount to *per se* rules in either direction must be resisted." *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring).

2. Petitioners and Wisconsin contend that the Court should adopt a presumption—or even a bright-line rule—that each individual "lot" recognized under state property law must be considered in isolation. See Pets. Br. 24-29; Wisconsin Br. 33-37. The Court should decline that invitation to transform the parcel-as-a-whole inquiry into a rigid single-factor test that turns solely on "legalistic distinctions" of state property law. *Keystone*, 480 U.S. at 500.

A rule or presumption that individual lots must be considered in isolation from contiguous, commonly owned land would disserve principles of fairness and justice by excluding or marginalizing other relevant factors. Cf. *Tahoe-Sierra*, 535 U.S. at 334 ("[T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by [a] * * * categorical rule[] or by a[n] * * * inquiry into all of the relevant circumstances in particular cases."). The considerations that govern a locality's decision to approve the subdivision of real property do not necessarily correspond to the factors that inform a determination whether it is fair to view land as a more integrated whole for purposes of a regulatory-takings analysis. Here, for example, the relevant regulation defines "[l]ot" broadly as any "contiguous parcel of land with described boundaries," NR § 118.03(23), with no requirement that those boundaries be drawn to isolate portions of land that are not properly considered with neighboring parcels for state regulatory purposes. When contiguous land is otherwise linked through features like common ownership, common acquisition, common use, and a common development plan, it would make scant sense—and lead to unfair results—to place dispositive or even presumptive weight on lot lines to measure the impact of a regulatory restriction on the property owner.

To give an example, developers frequently acquire a large tract of land and then receive approval to subdivide the tract pursuant to development plans, sometimes in stages and with only some portions subject to certain regulatory restrictions, such as protection for wetlands. In that situation, spatial, temporal, and

functional considerations will often warrant considering the entire tract as the relevant parcel when determining whether the regulatory scheme has "place[d] a burden on the use of only a small fraction" of the developer's overall property. *Keystone*, 480 U.S. at 500 n.27. An analysis single-mindedly focused on lot boundaries at a particular moment in time—while ignoring the full spatial, temporal, and functional dimensions that link a single lot to a broader tract—would dramatically shift the equilibrium of the regulatory-takings analysis by disconnecting the parcel-as-a-whole inquiry from the practical reality of how land has actually been acquired, used, developed, and conveyed.[2]

Just such a scenario is presented in a case in which the government has sought this Court's review. See *Lost Tree Vill. Corp.* v. *United States*, 707 F.3d 1286, 1288-1291 (Fed. Cir. 2013) (developer acquired 1300-acre parcel and profitably subdivided it into gated community with nearly 1400 home sites, before seeking compensation for alleged total taking of residual 4.99-acre area of regulated wetlands and submerged lands), petition for cert. pending, No. 15-1192 (filed Mar. 22, 2016). Other examples abound. See, *e.g.*, *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1377-1378 (Fed. Cir.) (claimants developed and

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[2] Such a rule could also permit property owners to manufacture total-takings claims by subdividing their property into regulated and unregulated portions. Even when a claimant does not purposefully engage in manipulation, that pattern of subdivision could follow naturally from the ordinary course of development. A parcel-as-a-whole test keyed to existing lot lines therefore could fundamentally alter the subdivision process by forcing States and localities to consider whether the approval of particular lot configurations might expose them to total-takings liability.

sold 261 acres of 311.7-acre parcel before alleging taking of 50.7 acres subject to regulatory restrictions), aff'd on reh'g, 231 F.3d 1354 (Fed. Cir. 2000); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1173-1174 (Fed. Cir. 1994) (claimants developed 199 acres of 250-acre parcel into single-family homes before alleging taking of 12.5-acre tract subject to regulatory restrictions); *Reahard* v. *Lee Cnty.*, 968 F.2d 1131, 1133 (11th Cir. 1992) (claimants "subdivided, developed, and sold" 500 acres of 540-acre parcel of "waterfront land" as a "single-family subdivision" before alleging taking of 40-acre residuum).

Notably, this Court in *Keystone* rejected an argument that a State's recognition of a distinct real-property interest should control the parcel-as-a-whole determination. See 480 U.S. at 500-502. There, the Court rejected a takings claim arising from a statute that allegedly "destroy[ed] the value of the[] [claimants'] unique support estate," which "consists of the right to remove the strata of coal and earth that undergird the surface" above a coal mine or "to leave those layers intact to support" structures upon the surface. *Id.* at 500 (citation omitted). For over a century, landowners had "sever[ed] title" to the support estate and conveyed it as a "separate, recognized interest in realty" distinct from the mineral and surface estates. *Id.* at 478-479. Because state law "regard[ed] the support estate as a separate interest in land," the claimants contended that it must be viewed "as a distinct segment of property for 'takings' purposes." *Id.* at 500-501.

The Court in *Keystone*, however, declined to rely on "legalistic distinctions" established by state property law to define the relevant parcel. 480 U.S. at 500.

It did not matter that "state law allowed the separate sale of the segment of property," because the support estate intrinsically had "value only insofar as it protect[ed] or enhance[d] the value" of the claimants' separate and distinct mineral estates. *Id.* at 500-501. The Court accordingly held that the support and mineral estates should be considered together as the relevant parcel. *Id.* at 501. Viewed that way, "the burden the Act place[d] on the support estate d[id] not constitute a taking" because "virtually all" of the coal in the mineral estate was unaffected by the regulation. *Ibid.*[3]

Keystone further refutes petitioners' (Br. 27-29) and Wisconsin's (Br. 23-24, 31) argument that lot lines should define the relevant parcel because owners expect their fee-simple estates to be independently useable and saleable. That argument conflates the parcel-as-a-whole inquiry with the antecedent question whether petitioners have a protected property interest in the first place. To be sure, state law creates property rights and interests protected by the Just Compensation Clause. See, *e.g.*, *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). Thus, in *Keystone*, there was no dispute that state law accorded protection to the support estate as a distinct fee-simple estate that could be independently sold. 480 U.S. at 478, 500-501; see *Captline* v. *County of*

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[3] *Keystone* also signaled that interests in real property that cross lot lines may be considered together as the parcel as a whole. The Court observed that even if the "support estate [were] a distinct segment of property for 'takings' purposes," it would be appropriate to consider the economic impact of the regulation by aggregating all the support estates the claimants had purchased across "a great deal of land." 480 U.S. at 501.

Allegheny, 459 A.2d 1298, 1301 (Pa. Commw. Ct. 1983), cert. denied, 466 U.S. 904 (1984). But as *Keystone* demonstrates, state law does not dictate when discrete property rights should be combined to form the parcel as a whole for a takings inquiry. 480 U.S. at 500-502.

Nor is a parcel-as-a-whole rule based solely on existing lot lines necessary to protect property owners' reasonable expectations regarding the permissible uses of their land. No matter the size of the relevant parcel, the *Penn Central* standards direct courts to consider a regulation's interference with reasonable, investment-backed expectations. "[T]he force of th[at] factor" can be "so overwhelming * * * that it disposes of the taking question," depending on the circumstances of the individual case. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984). And the inquiry into the "character of the governmental action" offers another check on government regulation. *Penn Central*, 438 U.S. at 124; see *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987) (finding a taking based on the "extraordinary" character of the government regulation). In short, the contextual *Penn Central* analysis affords suitable protection for property rights, well-grounded in this Court's precedents, with no need to adopt the "blunt * * * instrument" of a per se rule or presumption to govern the parcel-as-a-whole determination. *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo*, 533 U.S. at 628).

B. The Wisconsin Court Of Appeals Correctly Considered Lots E And F Together In Assessing Petitioners' Takings Claim

In this case, spatial, temporal, and functional considerations align to demonstrate that Lots E and F

are properly considered together for purposes of measuring the merger provision's impact.

1. At the outset, Lots E and F are commonly owned, contiguous lots. Moreover, they "have a common topography": Both lots are bisected by a steep bluff and feature relatively level areas atop that bluff and below it along the river. Pet. App. A3. Each lot individually falls far short of the longstanding and generally applicable minimum area and river-frontage requirements designed to protect both the river's important scenic values and owners' property values. But when merged, as called for by state and local law, they at least approach the minimum standards deemed necessary to accomplish those purposes. Spatially, Lots E and F are properly viewed as an integrated whole.

Temporal considerations reinforce the conclusion that Lots E and F should be considered together in determining the impact of the restrictions. Petitioners acquired both lots close in time, and in acquiring the second lot they merged it with the other lot by bringing it under common ownership long after the regulatory restriction was enacted. As the Wisconsin Court of Appeals emphasized, petitioners were "charged with knowledge of the existing zoning laws" and "had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot." Pet. App. A16-A17 (citation omitted). Because "the regulatory regime in place at the time the claimant acquires the property at issue" is relevant to the takings analysis, *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring), the timing and circumstances of petitioners' acquisition of the land support

the conclusion that it is fair and just to view the lots together for purposes of takings analysis.

Functional considerations further strengthen that conclusion. As the volleyball court on Lot E shows, that area adjacent to Lot F functions as a side yard for petitioners' existing cabin. See R. 17-127. Thus, as petitioners acknowledged below, they may use Lot E as "an extension of [their] use of Lot F and their cabin," and they "find some use and enjoyment of the extra space." R. 22-18 to 22-19. Petitioners "have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball" on Lot E, removed from the homeowners' association beach that cuts into Lot F. Pet. App. B9. Those linked uses, moreover, ensure that Lot E enhances the value of Lot F—and vice versa. As the trial court observed based on respondents' unrebutted appraisal, there "is less than a ten percent difference" between the value of the tracts as two separate, buildable lots and the value of the land as a unified larger parcel, with only one building site but significantly more private river frontage and a buffer from neighbors. *Ibid.*; see J.A. 58-59; R. 17-42 to 17-55. Lots E and F together thus properly form the parcel as a whole along every dimension.[4]

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[4] Petitioners contend (Br. 13) that the Wisconsin Court of Appeals erroneously adopted a per se rule that commonly owned, contiguous parcels must always be considered together as the parcel as a whole. Although some language in the court's opinion supports that reading, see Pet. App. A11, the court went on to consider, and reject as unpersuasive, petitioners' arguments for dividing their contiguous property into discrete segments. *Id.* at A11-A12, A17 nn.8-9. In any event, as discussed in the text, the court reached the right result in finding that Lots E and F together formed the relevant parcel.

2. The nature of the challenged regulatory restriction supplies a further basis to consider the economic impact on that entire area. The parcel-as-a-whole inquiry is not an end in itself, but is instead a guide in "compar[ing] the value that has been taken from the property with the value that remains." *Keystone*, 480 U.S. at 497. Because the merger provision links Lots E and F, there is no realistic or analytically coherent way to conduct that comparison here without considering the impact on both merged portions of petitioners' property.

Notably, the merger provision does not bar petitioners from selling or developing Lot E—but rather only conditions those actions by linking them to Lot F. Petitioners remain free to sell the property as a whole or to build and maintain a home "entirely on Lot E, entirely on Lot F, or * * * straddl[ing] both lots." Pet. App. A6. Because the regulatory restriction binds the parcels together for purposes of sale and development, any attempt to value the impact on Lot E must also account for the corresponding effect on Lot F.

The valuation evidence illustrates the point. Analyzing the lots as two independent parcels with two separate building sites before the variance denial, Lot E was worth $410,000 (according to petitioners' appraiser, R. 22-182), and Lot F was worth $373,000 (according to respondents' unrebutted appraisal, R. 17-55 to 17-56), for a combined value of $783,000. After the variance denial, when the lots were effectively merged into one for sale and development, respondents' unrebutted appraisal established that Lots

E and F together were worth $698,300. R. 17-46.[5] The net impact of the merger provision was therefore a decrease in value of $84,700 ($783,000 minus $698,300)—which necessarily has to be calculated by looking at *both* portions of petitioners' property.[6]

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[5] Petitioners' appraiser stated that Lot E's market value was $40,000 after the variance denial, but he based that on the counterfactual assumption that Lot E could be separately sold from Lot F but not developed. See R. 22-188. Petitioners did not dispute that, under the merger provision as it *actually* operated, the two lots together with one building site had a combined value of $698,300. Because the lots merged, with the possibility of building a home on any part of the property, it is artificial to try to apportion their combined value between the two lots. But even using petitioners' proposed post-merger value of $40,000 for Lot E, Lot F's post-merger value would be $658,300, calculated by taking the combined value of $698,300 and subtracting the $40,000 attributed to Lot E. Compared to Lot F's pre-merger value of $373,000, that represents an increase in value of $285,300. If the merger provision reduced Lot E's value by $370,000 ($410,000 minus $40,000), but increased Lot F's value by $285,300, then the net impact is a reduction in overall value of $84,700.

[6] The reduction in total value of $84,700 is properly treated as the numerator of the equation measuring economic impact. Notably, whether the denominator is Lot E alone ($410,000), or both lots in combination ($783,000, representing $410,000 for Lot E and $373,000 for Lot F), the overall economic impact of a 21% or 11% reduction in value, respectively, does not approach the level generally thought necessary to find a regulatory taking. See *CCA Assocs.* v. *United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) ("[W]e are aware of no case in which a court has found a taking where diminution in value was less than 50 percent") (citation and internal quotation marks omitted), cert. denied, 133 S. Ct. 422 (2012). Moreover, the Wisconsin Court of Appeals found that petitioners had no reasonable, investment-backed expectation of separately selling or developing Lot E, Pet. App. A17-A18, and that "the nature and character of the government action" weighed against finding a taking, *id.* at A14. As this Court has recognized,

This Court conducted a similar analysis in *Penn Central* when it rejected the claim that New York City's landmarks-preservation law effected a taking of the air rights above Grand Central Terminal by preventing the construction of an office building atop the Terminal. 438 U.S. at 135-138. Although the law "restrict[ed] the owner's control over" the Terminal, it also "enhance[d] the [owner's] economic position" by permitting the owner "to transfer development rights" to nearby parcels in common ownership, with eight other buildings "eligible to be recipients of development rights afforded the Terminal by virtue of [its] landmark designation." *Id.* at 113-115. The Court concluded that, even if the transferable development rights would "not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the owner]." *Id.* at 137. "[F]or that reason," the Court held that the transferable development rights "are to be taken into account in considering the impact of [the] regulation." *Ibid.*; see *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring in part and concurring in the judgment) (positing an understanding of *Penn Central* as holding that "[t]he relevant land * * * was the aggregation of the owners' parcels

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density ordinances "benefit the [claimants] as well as the public" by "assuring careful and orderly development of residential property with provision for open-space areas." *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980). Although petitioners suggest (Br. 31) that they were singled out, here, as in most cases, the ordinance had a similar effect on nearby properties. J.A. 67; see *Agins*, 447 U.S. at 262.

subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished" in light of the transferable development rights).

Just as in *Penn Central*, the value that accrues to petitioners from combining Lots E and F "mitigate[s] whatever financial burdens the law has imposed" in barring separate sale or development of Lot E. 438 U.S. at 137. The necessity of taking that effect "into account in considering the impact of [the] regulation" fortifies the conclusion that Lots E and F must be considered together for purposes of takings analysis. *Ibid.*

3. Petitioners' arguments to the contrary lack merit.

Petitioners primarily contend (Br. 27) that Lots E and F should be considered in isolation because lot lines establish that they are "two separate pieces of property." But petitioners' reliance solely on the aspects of state law that give effect to lot boundaries ignores that state law in this case (like zoning regulations in many jurisdictions, see County Br. 41-45) also provides that contiguous, commonly owned substandard lots are effectively merged into one. Pet. App. A1-A2; see Wisconsin Br. 37-43. The merger provision reflects a governmental determination that contiguous, substandard lots should be combined when possible, without causing undue hardship, because they are unsuited for separate development. See J.A. 65 (Board's finding that Lots E and F together constituted a "single, more conforming parcel that is more suitable for residential development"). The merger provision accordingly operates to render the grandfather provision inapplicable when the hardship calcu-

lus giving rise to the rationale for grandfathering is inapplicable. See 2 Kenneth H. Young, *Anderson's American Law of Zoning* § 9.67, at 325-330 (4th ed. 1996) (describing the common exception to grandfather provisions for adjacent substandard lots in common ownership, which must be combined to "meet, or more closely approximate, the frontage and area requirements" of zoning ordinances, and noting that such a merger "may be regarded as imposing no unnecessary hardship"). Thus, to the extent that state law informs the analysis, it demonstrates that Lots E and F are properly considered in combination.

Petitioners further contend (Br. 30) that they had distinct expectations for Lots E and F, with no intent to "blur the property lines." But while petitioners now assert (Br. 30) that "Lot E was purchased as an investment" and "the plan was to simply let the investment grow in value until some future time," they previously testified that their parents had hoped to build a retirement home atop the bluff "in the middle of the two existing lots" while retaining the beachfront cabin. J.A. 91; see R. 22-68 (testimony by petitioner Donna Murr that her parents' "goal and their desire all along [wa]s to * * * redraw the lot lines, build a house on top, keep the cabin at the bottom"). Petitioners further testified that they themselves would have liked to reorient the lots lines and sell an as-yet-unrecorded lot atop the bluff while keeping an as-yet-unrecorded beachfront lot containing portions of both Lots E and F. R. 22-77, 22-134. Thus, "the history of the * * * purchase, use, and plans for the parcels" cuts against petitioners' argument that Lots E and F are "separate and distinct." Pets. Br. 30.

In any event, the regulatory scheme existing at the time petitioners chose to bring the lots under common ownership greatly undermines their alleged expectation of separate use. Pet. App. A17-A18. The merger provision had been on the books for decades, *id.* at A16, and Wisconsin law had even earlier recognized that "[l]ands adjacent to or near navigable waters exist in a special relationship to the state." *Just* v. *Marinette Cnty.*, 201 N.W.2d 761, 769 (Wis. 1972); see *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."). Because petitioners did not "ha[ve] an unfettered right to use their land as they pleased at the inception of their ownership," their alleged unilateral expectations of separate use provide no basis to isolate Lot E from Lot F when analyzing their regulatory-takings claim. *Id.* at A16.

Finally, petitioners emphasize (Br. 30) that they acquired Lots E and F in different transactions a year apart. But their parents' decision to structure those gifts sequentially does not override the many other factors demonstrating that the whole area is rightly considered the parcel as a whole. The Wisconsin Court of Appeals thus correctly measured the impact of the merger provision by reference to petitioners' entire property interest and rightly concluded that no taking had occurred.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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RECORD
AND
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No. 15-214

In The

Supreme Court of the United States

JOSEPH P. MURR, ET AL.,

Petitioners,

v.

WISCONSIN, ET AL.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND THE WISCONSIN CHAPTER OF THE AMERICAN PLANNING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1909 to advance the art and science of land use, economic, and social planning at the local, regional, state, and national levels. The APA represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The APA regularly files amicus briefs in federal and state appellate courts in cases of importance to the planning profession and the public interest. Through its 47 chapters, the APA has a presence in all fifty states and the District of Columbia, including the Wisconsin Chapter of the APA.

APA members and chapters advocate excellence in planning, promoting education and citizen empowerment, and providing the tools and support necessary to meet the challenges of growth and change. Education is a central focus of the APA, and this brief provides an important opportunity to provide the Court with the context for subdivision, zoning, and other traditional forms of land use regulation at the local and state

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

levels that have formed the legal landscape of American real estate development for more than a century.

SUMMARY OF ARGUMENT

Subdivision regulations and zoning ordinances have for several decades been familiar and complementary forms of local land use regulation in urban, suburban, and even rural communities throughout the United States. The decision to subdivide a plot of land into smaller units is typically initiated by a landowner or developer, who submits the proposed land division to local planning officials for approval, as was the case in the 1950s with the property that is the focus of the instant case. The landowner or developer proposes the boundary lines for individual lots, and provisions are included in state statutes to allow those lines to be redrawn, subsequent to subdivision approval, by parcel owners, subsequent developers, or by public officials in certain instances. It is not at all unusual for purchasers to buy and build one residence on more than one lot or to re-divide an individual lot.

Because the more intense development that follows upon subdivision of residential land will have an impact on traffic, public utilities, fire protection, recreation, education, and environmentally sensitive lands, local governments often ensure that developers provide streets and other infrastructure improvements before granting final plat approval. Like all real estate development in a locality that has adopted zoning, the

subdivision of land must comply with the height, area, use, and other restrictions found in the local zoning ordinance or code, whose provisions are adopted and amended by the local legislature, as authorized by state zoning enabling legislation.

There is a long record of judicial approval of traditional zoning and subdivision regulations in the United States Supreme Court and in state and lower federal courts, despite landowner claims that local and state restrictions on land development amount to denials of equal protection, deprivations of property without due process of law, or regulatory takings. As this Court made clear in its 1926 decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), zoning and other forms of land use regulation fit comfortably within the state's police power obligation to protect public health, safety, and general welfare. The Court has consistently placed the burden on a property owner challenging the constitutionality of land use regulation to demonstrate that local or state officials have behaved in an arbitrary, capricious, unreasonable, or confiscatory manner.

Judicial approval of sensible local and state zoning, subdivision, and related land use laws makes eminent sense and is consistent with longstanding constitutional principles. This Court has long acknowledged that real property law is the traditional province of state law. Many states and localities, like Wisconsin and St. Croix County, have experimented with the use of merger provisions to maintain the crucial balance between private rights and public needs. Of course

states are free to choose other regulatory tools or to modify existing merger law provisions. Some state courts, adhering to their own state constitutional principles, have chosen to provide enhanced protection for private property owners affected by land use regulation.

Built into traditional local and state land use regulation are provisions designed to protect the vested rights of existing landowners and to ensure that restrictions on the use of land will not cause single or small groups of landowners to suffer a greater burden than their neighbors. The substandard lots provision challenged by the Petitioners, for example, is designed to allow existing landowners to develop their properties even if the physical dimensions of those properties do not comply with new provisions designed to protect the Lower St. Croix Riverway. If the Petitioners had not acquired the adjoining parcels in separate real estate transactions several years after the effective date of the merger provision, they would not have been subject to the merger provision.

Local governments, following state law and protecting property rights, allow landowners to seek variances from especially onerous zoning, subdivision, and other land use regulations. It is a central principle of land use law, however, that variance procedures are made available to property owners who, *owing to no fault of their own*, are placed in an economic straitjacket. The officials charged with deciding on variance proposals routinely reject claims based on hardships that are deemed self-created (or self-imposed). As

noted previously, the substandard lot and merger provisions were implemented several years before the Petitioners acquired title to the adjoining lots.

ARGUMENT

I. LANDOWNERS AND DEVELOPERS WHO SUBDIVIDE PARCELS OF LAND INTO SMALLER LOTS FOR SALE ARE SUBJECT TO SUBDIVISION REGULATIONS AND ZONING ORDINANCES THAT ARE COMMON IN URBAN, SUBURBAN, AND EVEN RURAL COMMUNITIES THROUGHOUT THE UNITED STATES.

A. The subdivision developer typically submits to local regulators a map showing the proposed boundary lines for individual parcels.

American landowners have been subdividing larger properties into smaller parcels for sale at least since the early nineteenth century: "Throughout the 1820s, 1830s, and 1840s, developers subdividing land in locations adjacent to the centers of New York and Boston looked for ways to promise middle-class community to potential customers." Dolores Hayden, *Building Suburbia: Green Fields and Urban Growth, 1820-2000* 42 (2003). These early subdividers, like

their modern counterparts, "never liked to sell land one plot at a time." *Id.*[2]

Today, state and local subdivision regulation is ubiquitous:

> Legislation in all states now authorizes local governments to impose a number of requirements on new subdivisions when they are platted and improved. Subdivision control ordinances require the appropriate design of lots and blocks, subdivision access, and such necessary internal improvements as internal streets and drainage, and water and sewer facilities.

Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* § 1.09 (6th ed. 2015). Moreover, "[c]ourts usually uphold the constitutionality of subdivision control requirements for subdivision design and necessary internal improvements." *Id.*

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[2] Even as public amenities became more commonplace in the late nineteenth century, the subdivision process remained owner-initiated:

> Both commercial house builders and individual families depended upon the prior work of land subdividers who cut up fields and laid out streets. The importance of this primary work cannot be overemphasized. The subdividers, by getting streets accepted as legal ways by the city of Boston, secured the modern water, gas, and sewer services so essential to small middle class developments.

Sam Bass Warner, Jr., *Streetcar Suburbs: The Process of Growth in Boston (1870-1900)* 61 (2d ed. 1978).

In 1849, Wisconsin legislators enacted statutory "provisions requiring a survey and plat for all subdivisions or additions to any town, setting out the requirements for the plat [the subdivision map], and providing a penalty for selling or leasing the lots without complying with the statutory requirements." Marygold Shire Melli, *Subdivision Control in Wisconsin*, 1953 Wis. L. Rev. 389, 405 (citing Wis. Laws 1849, c. 41). As one expert has noted, this initial legislation "reflected a strong purpose for subdivision laws that still exists today – ensuring adequate legal descriptions and proper survey monumentation of subdivided land to promote the marketability of that land." Brian W. Ohm, *Wisconsin Land Use and Planning Law* § 6.02. The current version of Wisconsin's statute regarding platting lands contains a description of the legislative purpose that is typical of state statutes:

> The purpose of this chapter is to regulate the subdivision of land to promote public health, safety and general welfare; to further the orderly layout and use of land; to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage and other public requirements; to provide for proper ingress and egress; and to promote proper monumenting of land subdivided and conveyancing by accurate legal description. . . .

Wis. Stat. § 236.01.

According to the Petitioners' complaint, "[t]he St. Croix Subdivision plat was created in the 1950s," and "[t]he plat identifies the [Petitioners'] property as Lot E and Lot F." Joint Appendix, at 6. As expressed in Wis. Stat. § 236.11, the owner (or subdivider) may initiate the subdivision process by submitting a "preliminary plat" (defined in Wis. Stat. § 236.02(9) as "a map showing the salient features of a proposed subdivision submitted to an approving authority for purposes of preliminary consideration"). The final plat map, also subject to approval by local government officials, must include, among other information, "the boundary lines of all blocks, public grounds, streets, and alleys, and all lot lines," and "[a]ll lots and outlots in each block consecutively numbered within blocks. . . ." Wis. Stat. § 236.20(2)(c), (e).

B. Local and state laws provide opportunities for parcel lines to be redrawn after the initial subdivision plat is approved.

Lot lines contained in approved subdivisions are by no means set in stone. For example, Wis. Stat. § 236.40 provides that "[t]he owner of the subdivision or of any lot in the subdivision" is permitted "to apply to the circuit court for the county in which a subdivision is located for the vacation or alteration of all or part of a recorded plat of that subdivision." Such provisions allowing replats and resubdivisions are quite sensible and respectful of the rights of property owners, as "[s]ometimes, a community may be faced with a

plat approved and recorded decades ago but never developed or only partially developed." Brian W. Ohm, *Wisconsin Land Use and Planning Law* § 6.05. The fact situation faced by this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), involved a resubdivision, for example. *See Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 709 (R.I. 2000): "In 1936, an earlier owner had subdivided that portion of the land lying along Atlantic Avenue, leaving the remainder as an undivided lot. In 1959, SGI submitted to the town a new plat subdividing the entire property into eighty lots." *See also Arking v. Montgomery Cty. Planning Bd.*, 21 Md. App. 589, 593, 82 A.3d 1227, 1229 (2013) ("Tamara sought approval for the resubdivision of the then-undeveloped Lot 17, Block B of the Willerburn Acres Subdivision, containing 1.01 acres, into two lots of roughly equal size, known as 'Lot 60' and 'Lot 61,' in order to build two separate single-family houses."); *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 9, 43 S.W.3d 140, 146 (2001) ("[I]t is generally recognized that no restriction on subdividing lots is implied by the mere filing of a map depicting the lots."); *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954) ("[T]he rule is that the mere sale of lots by reference to a recorded map raises no implied covenant as to size or against further subdivision.").

Lot lines can also be redrawn as a result of eminent domain, adverse possession, and, as in the instant case, merger. *See, e.g., County of Monmouth v. Kohl*, 242 N.J. Super. 210, 212, 576 A.2d 323, 324 (App. Div. 1990) ("The metes and bounds description and the sketch

showed that the strip of defendants' property which the County was taking was bounded on the north by the highway, on the east and west by their lot lines, and on the south by a line approximately 17 feet distant from and parallel to the highway right-of-way."); (*Kojis v. Rosnow*, No. 95-1005, 1995 Wisc. App. LEXIS 1451, at *1-2 (Ct. App. Nov. 21, 1995) ("The trial court redrew the boundary between Lots 2 and 3, awarding the Kojises a part of Lot 2 based on adverse possession.").

It is also not unusual for residential owners to purchase two adjoining subdivision lots and build one structure on both. *See, e.g.*, *Heath v. Parker*, 93 N.M. 680, 680, 604 P.2d 818, 818 (1980) ("Parker purchased two lots in the Deming Ranchettes subdivision in 1975 and 1977. He bought a double-wide mobile home and moved it on the lots."); *Mueller v. People's Counsel for Balt. Cty.*, 177 Md. App. 43, 59, 934 A.2d 974, 983 (2007) (the landowner "conceded that he uses his own lots as 'one parcel'; that his house 'straddles' the lot line; and his home is 'built in the center' of the two lots. Nevertheless, he explained that it is 'very common' in the neighborhood for houses to be built 'on double lots.'"). Even if taxing authorities should use two parcel numbers for assessment purposes, it would make little sense for a court to treat this residence as two parcels for purposes of constitutional takings analysis.

Indeed, while in most instances the one, specific lot in a subdivision owned that is the subject of a government regulation would be the proper focus of a takings analysis, such is not always the case. The impermanence of lot lines is a feature of real estate law

generally and subdivision law specifically. To base takings analysis *necessarily* on a unit of property ownership that is subject to change, often at the instigation of the landowners themselves, is problematic.

C. Subdivision proposals, which are typically submitted for approval to non-elected administrators or boards, must comply with zoning ordinances that are adopted and amended by the local government's legislative body.

The subdivision of larger parcels of land into smaller lots for resale is an activity that, as noted above, is subject to state and local regulation. In almost all American urban and suburban communities, zoning is a parallel, complementary form of police power regulation governing the use of real property. Subdivision proposals, like all real estate development projects, must comply with the use, height, setback, and other requirements of the zoning ordinance. As the Supreme Court of Connecticut has noted,

> We also have recognized that, although the zoning and planning functions are distinct, they are not entirely unrelated. For example, zoning commissions are authorized under [Conn. Gen. Stat. Ann.] § 8-2 to regulate lot size and shape; and General Statutes § 8-2611 expressly forbids a zoning commission from approving any subdivision application that conflicts with such regulations.

Lord Family of Windsor, LLC v. Planning & Zoning Comm'n, 288 Conn. 730, 736-37, 954 A.2d 831, 835-36 (2008) (citations omitted).

Several authorities discuss the relationship between subdivision and zoning regulations. The Maryland Court of Appeal, for example, has explained:

> It is well-settled that zoning regulations and subdivision controls regulate different aspects of the land use regulatory continuum. While zoning laws define the uses that are permitted in a particular zoning district, . . . subdivision regulations inform how, when, and under what circumstances a particular tract may be developed. Included in these subdivision controls are provisions which require the developer/property owner to construct infrastructure improvements of various types necessary to support "uses" permitted in the zone by the applicable zoning regulations.

People's Counsel for Balt. Cty. v. Surina, 400 Md. 662, 688-89, 929 A.2d 899, 914-15 (2007) (citations omitted).

These two ubiquitous forms of land use regulation differ structurally as well:

> The most important legal difference between zoning and subdivision is in the administration of the two regulatory programs. The change of zoning necessary for many new developments is typically an act of the local legislative body, involving an amendment to a map that is adopted as part of a local ordinance or law. In contrast, the regulation of

> subdivisions is entirely administrative and involves comparing the proposed subdivision to standards set forth in adopted regulations.

Powell on Real Property § 79D.03[2] (Michael Allan Wolf gen. ed. 2016). The power to review and approve subdivision plats often resides in the local planning board or commission, or it may be retained by the local legislative body. *See, e.g.*, Arden H. Rathkopf *et al.*, *Rathkopf's The Law of Zoning and Planning* § 89:18 (2016); Patricia E. Salkin, *American Law of Zoning* § 31:9 (2016).

II. TRADITIONAL ZONING AND SUBDIVISION REGULATIONS HAVE A LONG TRACK RECORD OF ACCEPTANCE BY FEDERAL AND STATE COURTS, DESPITE EQUAL PROTECTION, DUE PROCESS, AND TAKINGS CLAIMS.

A. Local land use regulation is widely understood to be within the police power obligations of the state to protect public health, safety, and general welfare.

The local subdivision, zoning, and riverway protection regulations involved in the instant case reside comfortably within the state's duly designated police power authority and responsibility to protect the public health, safety, and general welfare. As Chief Justice Roberts wrote for the majority in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007), "States and municipalities are not

private businesses – far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."

The purpose of Wisconsin's statute authorizing localities to regulate subdivisions, for example,

> is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. . . .

Wis. Stat. § 236.45. Similar language can be found in the zoning enabling statute – Wis. Stat. § 59.69 ("to promote the public health, safety, convenience and general welfare") – and in the statute preserving the Lower St. Croix River – Wis. Stat. § 30.27 ("The preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of Wisconsin.").

The purpose of Wisconsin's "Standards for the Lower St. Croix National Scenic Riverway" (Wis. Admin. Code NR 118.01-.09) is undeniably consistent with the goals of the state's police power and with the wishes of Congress:

> The following rules are necessary to reduce the adverse effects of overcrowding and poorly planned shoreline and bluff area development, to prevent pollution and contamination of surface waters and groundwaters and soil erosion, to provide sufficient space on lots for sanitary facilities, to minimize flood damage, to maintain property values, and to preserve and maintain the exceptional scenic, cultural and natural characteristics of the water and related land of the Lower St. Croix riverway in a manner consistent with the national wild and scenic rivers act (P.L. 90-542), the federal Lower St. Croix river act of 1972 (P.L. 92-560) and the Wisconsin Lower St. Croix river act (s. 30.27, Stats.).

Id. at NR 118.01.

Judicial recognition of the essential relationship between land use regulation and the police power is widespread. *See, e.g.*, *Munroe v. Town of E. Greenwich*, 733 A.2d 703, 710 (R.I. 1999) ("Zoning, land development and subdivision regulations constitute a valid exercise of police power. . . ."); *In re Estate of Sayewich*, 120 N.H. 237, 240, 413 A.2d 581, 583 (1980) (citations omitted) ("Subdivision regulations are not a means of controlling the alienability of land, but of promoting the orderly and planned growth of a municipality. To

the extent that it promotes the health, safety, morals and general welfare of the community, the imposition of subdivision regulations is a proper exercise of the police power."); *State ex rel. Anaya v. Select W. Lands, Inc.*, 94 N.M. 555, 558, 613 P.2d 425, 428 (Ct. App. 1979) ("It is widely established that enactment of subdivision laws is a proper exercise of the legislature's police power for safeguarding the interest of the public against fraud, financial loss, and injury to public health and safety."); *Wood v. City of Madison*, 260 Wis. 2d 71, 121, 659 N.W.2d 31, 56 (2003) ("Zoning, like subdivision regulation, is an exercise of the police power.").

B. Property owners bear the significant burden of showing that local subdivision regulations and zoning ordinances are arbitrary, capricious, unreasonable, or confiscatory.

For ninety years, this Court has recognized the fundamental constitutionality of zoning and other forms of land use regulation, even when property owners claim that their rights under the Due Process, Equal Protection, or Takings Clauses have been violated. The pattern of deference to local land use regulators was firmly established in the Court's ruling in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which Justice Sutherland, writing for the majority, explained that, "before the [village's zoning] ordinance can be declared unconstitutional," the Court must say "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to

the public health, safety, morals, or general welfare." *Id.* at 395. Moreover, the Court provided guidance for lower federal and state court judges in zoning cases when Justice Sutherland wrote: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. *See generally*, Michael Allan Wolf, *The Zoning of America:* Euclid v. Ambler (2008).

While *Euclid v. Ambler* and its progeny were cases involving due process and equal protection challenges, federal and state courts have also upheld traditional zoning practices when landowners have alleged that confiscatory regulatory takings have occurred. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land. . . .");[3] *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("citation omitted") ("Indulging in the usual presumption of constitutionality, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation."); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984) ("[T]he inability of appellants to receive a reasonable

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[3] While the *Agins* Court offered a second way in which a general zoning ordinance could effect a taking – "if the ordinance does not substantially advance legitimate state interests," 447 U.S., at 260, a unanimous Court later clarified "that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking. . . ."); *Huard v. Town of Pelham*, 159 N.H. 567, 574, 986 A.2d 460, 466 (2009); ("These assertions fail to support a claim that the ZBA's [Zoning Board of Appeal's] application of the zoning ordinance substantially denied him the economically viable use of his land."); *Central Motors Corp. v. City of Pepper Pike*, 73 Ohio St. 3d 581, 587, 653 N.E.2d 639, 644 (1995) ("A zoning ordinance denies a property owner an economically viable use if it denies an owner all uses except those which are highly unlikely or practically impossible under the circumstances.").

III. REAL PROPERTY LAW, INCLUDING LAND USE REGULATION, HAS LONG BEEN RECOGNIZED TO BE WITHIN THE TRADITIONAL PROVINCE OF STATE LAW.

A. Like Wisconsin and St. Croix County, many states and localities throughout the nation use merger provisions for lots that do not meet the physical dimensions required by land use regulations.

This Court has long viewed real property law as the special province of state law. For example, Justice Scalia, in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2597 (2010), observed that, "[g]enerally speaking, state law defines property interests." Cited for this proposition was Chief Justice Rehnquist's majority opinion in *Phillips*

v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)): "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *See also Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law.").

What is true of the common law of real property is equally true of state and local regulation of land use. Justice Thomas has referred to zoning as "the quintessentially local activity." *Evans v. United States*, 504 U.S. 255, 295 (1992) (Thomas, J., dissenting). Justice Marshall, although dissenting from the majority's refusal to find a specific zoning provision invalid, stated:

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. . . .

> Our role is not and should not be to sit as a zoning board of appeals.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). *See also Warth v. Seldin*, 422 U.S. 490, 508 (1975) ("[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities."). The notion expressed by Justice Marshall, particularly in the last quoted sentence, has been shared for several decades by state and federal appellate judges who do not view it as their role to second-guess local land use regulators. *See, e.g.*, *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) ("[T]his court has repeatedly said that federal courts do not sit as a super zoning board or a zoning board of appeals."); *Constr. Indus. Ass'n of Sonoma Cty. v. Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975) ("Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation."); *Peachtree Dev. Co. v. Paul*, 67 Ohio St. 2d 345, 354, 423 N.E.2d 1087, 1094 (1981) ("[W]e do not sit as a super board of zoning appeals."); *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 430, 86 N.W.2d 166, 169 (1957) ("[T]his Court does not sit as a super-zoning commission.").

For more than a century, American states and municipalities, as part of the great federalist experiment, have developed variations on the initial patterns of planning and zoning as responses to, using Justice

Scalia's memorable phrase, "changed circumstances or new knowledge." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992). The merger provision found in the St. Croix County Code of Ordinances § 17.36, part of the state and county effort to protect the Scenic Riverway, is the product of the state and local legal laboratory. Several legislatures have enacted merger provisions in state land use law, and dozens of municipalities throughout the country, in accordance with state authorization or on their own, have promulgated similar exceptions from "grandfather" clauses that permit use of lots otherwise deemed undevelopable.

Minnesota's statutory protections for the same Lower Saint Croix Nation Scenic Riverway feature provisions on nonconforming lots, including multiple lots held by a common owner. In order to develop an individual lot held under common ownership, the following conditions, reflective of the sensitivity of shoreland parcels, must be met:

> (1) the lot must be at least 66 percent of the dimensional standard for lot width and lot size for the shoreland classification . . . ;
>
> (2) the lot must be connected to a public sewer, if available, or must be suitable for the installation of a Type 1 sewage treatment system . . . ;
>
> (3) impervious surface coverage must not exceed 25 percent of each lot; and
>
> (4) development of the lot must be consistent with an adopted comprehensive plan.

Minn. Stat. § 394.36(5)(c). The following merger provision applies if the requirements listed above cannot be met: "A lot . . . not meeting the requirements . . . must be combined with the one or more contiguous lots so they equal one or more conforming lots as much as possible." Minn. Stat. § 394.36(5)(d).

Mass. Gen. Laws ch. 40A, § 6 similarly carves out an exception for commonly owned property:

> Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. . . .

Some state legislatures have enacted statutes authorizing local governments to enact merger provisions. Rhode Island's law, for example, allows the merger option, subject to certain standards that will ensure rational land development: "Provisions may be made for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots or to reduce the extent of dimensional nonconformance." R.I. Gen. Laws § 45-24-38. Localities in New Mexico and California are also allowed the option

of incorporating merger provisions in their zoning ordinances. *See* N.M. Stat. Ann. § 47-6-9.1(B) ("Nothing in this section limits a board of county commissioners, pursuant to notice and public hearing, from requiring consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels.").

The California statute authorizes local governments to employ merger under specified conditions. A review of those conditions reveals some of the reasons why the development of substandard lots is antithetical to sound planning practices. Merger will be allowed only if,

> With respect to any affected parcel, one or more of the following conditions exists:
>
> (1) Comprises less than 5,000 square feet in area at the time of the determination of merger.
>
> (2) Was not created in compliance with applicable laws and ordinances in effect at the time of its creation.
>
> (3) Does not meet current standards for sewage disposal and domestic water supply.
>
> (4) Does not meet slope stability standards.
>
> (5) Has no legal access which is adequate for vehicular and safety equipment access and maneuverability.

> (6) Its development would create health or safety hazards.
>
> (7) Is inconsistent with the applicable general plan and any applicable specific plan, other than minimum lot size or density standards.

Cal. Gov. Code § 66451.11(b).

Like St. Croix County, local governments in the states cited in the paragraphs above, and in other states throughout the country, have adopted a range of merger provisions. By sampling language from a few ordinances, the reader can get an idea of the popularity and similarity of the merger language employed by local lawmakers. Old Orchard Beach, Me., Code § 78-145(b) provides:

> If two or more contiguous lots are owned by the same person and if any of the lots do not meet the requirements for lot frontage or lot areas established by this chapter, the lots shall be merged to the extent necessary to create a lot which complies with the lot frontage and lot area requirements of this chapter, and no portion of the lots so merged which does not meet the lot area and lot frontage requirements of this chapter may be built upon or may be sold if such sale would result in separate ownership of the nonconforming portion.

Huntsville, Ala., Code § 74.1.2 provides:

> Where two or more contiguous lots under common ownership are sufficient to create one lot of dimensions conforming to the requirements

> for the district in which the lots are located but the lots are not sufficient for the creation of two or more fully conforming lots, then all of the said lots shall be deemed merged into one lot.

Lafayette, Colo., Code § 26-26-5(b) provides:

> If two (2) or more adjacent, unimproved, nonconforming lots with continuous frontage are held in identical ownership at any time after the effective date of this chapter, the lands shall be considered to be an undivided lot or parcel and no portion of such lands shall be sold or used in a manner that diminishes compliance with the lot width and area requirements established by this chapter.

The idea of merging multiple substandard or otherwise nonconforming parcels and treating them as one is not unusual, unprecedented, or unwise. The burden should be on parties such as the Petitioners who are challenging merger provisions to overcome the longstanding deference that this Court has afforded local land use regulators exercising traditional zoning, planning, and subdivision functions.

B. State legislatures are free to adopt, reject, or modify merger provisions.

While many states and localities have adopted merger provisions, lawmakers in most states are free to craft those measures to meet local circumstances or to choose not to rely on the merger tool. The experience

in Vermont is instructive, for in 2003 the state legislature amended a mandatory merger provision with a permissive one ("The [municipal] bylaw *may provide* that if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the nonconforming lot shall be deemed merged with the contiguous lot." 24 Vt. Stat. Ann. § 4412(2)(B) (emphasis added).

C. State judges interpreting their own state constitutions can choose (and have chosen) to provide enhanced protection for real property owners.

This Court has shown itself to be a strong bulwark for the protection of private property rights. Nevertheless, state high courts, relying on provisions from their own state constitutions, are free to augment the ample protections that the U.S. Constitution affords private property owners. For example, in *PA Nw. Distribs. v. Zoning Hearing Bd.*, 526 Pa. 186, 584 A.2d 1372 (1991), the Supreme Court of Pennsylvania – interpreting Pa. Const. art. I, §§ 1 (identifying the right "of acquiring, possessing and protecting property" among "certain inherent and indefeasible rights") and 10 (the state takings clause) – ruled, contrary to the prevailing rule in other jurisdictions, that the use of amortization to eliminate nonconforming uses was invalid. The Supreme Court of New Hampshire has questioned the generous deference afforded local officials exercising their zoning power, ruling, "As the right to use and enjoy property is an important substantive right, we use

our intermediate scrutiny test to review equal protection challenges to zoning ordinances that infringe upon this right." *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 758, 917 A.2d 707, 717 (2007).

IV. STATE AND LOCAL LAND USE REGULATIONS PROVIDE MANY MECHANISMS FOR PROTECTING VESTED PRIVATE PROPERTY RIGHTS.

A. Local zoning ordinances feature a wide variety of measures designed to allow landowners to continue the operation of uses and the use of buildings that have become nonconforming owing to new regulations.

When zoning and other land use regulations are implemented for the first time in a municipality, or when regulations further restrict allowable uses of land or the dimensions of the property upon which development can take place, the vested rights of landowners already making use of the land are protected by statutes, ordinances, and court rulings. These vested rights protections are common, despite this Court's argument in *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (citation omitted), that police power regulations can be retroactive: "A vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." "The courts now hold that a municipality may not zone retroactively to terminate a nonconforming

use, and some state zoning statutes impose this limitation." Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* § 5.74 (2015). *See, e.g.*, *Jones v. City of Los Angeles*, 211 Cal. 304, 321, 295 P. 14, 22 (1930) ("[W]here, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power."); Ky. Rev. Stat. Ann. § 100.253(1) ("The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.").

B. The substandard lots provision in this case was enacted to maintain the development rights of existing landowners while providing protection for the Lower St. Croix Riverway.

The general intent and effect of St. Croix County, Wis., Code of Ordinances Land Use & Dev., Subch. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36I.4, the provision challenged in the instant case, are to protect the development rights of owners affected by Wisconsin's "Standards for the Lower St. Croix National Scenic Riverway," Wis. Adm. Code NR 118.01-.09. The language of § 17.36I.4 – that which permits substandard lots to be used as building sites under certain circumstances (the "grandfather" provision) and that which provides special conditions for the

sale and development of adjacent, substandard lots held by a common owner as in the instant case – is identical to the language found in Wis. Admin. Code NR 118.08(4), the provision governing substandard lots.

C. The Petitioners were subject to the merger provision because they acquired title to the two adjacent, substandard lots more than 18 years after the effective date of the change in land use regulations that public officials adopted to protect the Riverway.

According to the Court of Appeals of Wisconsin, Lots E and F were under separate ownership when the new regulations went into effect in 1976. According to the court, it was not until 1995, after the Murrs' parents transferred the lots to all of the Murr children that the adjoining, then-substandard lots were held in common ownership and thus subject *for the first time* to the state and county restrictions. *See Murr v. St. Croix Cty. Bd. of Adjustment*, 332 Wis. 2d 172, 177-78, 796 N.W.2d 837, 841 (Ct. App. 2011). Even after the merger provision went into effect, the Murrs' parents would have been able to take advantage of the "grandfather" provision, an option that was not available to the Petitioners who, through separate conveyances, acquired ownership of adjoining parcels after the duly promulgated regulations went into effect.

Built into traditional local and state land use regulation are provisions designed to protect the vested

rights of existing landowners and to ensure that restrictions on the use of land will not cause single or small groups of landowners to suffer a greater burden than their neighbors. The substandard lots provision challenged by the Petitioners, for example, is designed to allow existing landowners to develop their properties even if the physical dimensions of those properties do not comply with new provisions designed to protect the Lower St. Croix Riverway. If the Petitioners had not acquired the adjoining parcels in separate real estate transactions after the effective date of the merger provision, they would have been able to develop both separately owned, though adjacent, substandard lots.

V. PROPERTY OWNERS WHO ARE PARTICULARLY BURDENED CAN SEEK VARIANCES FROM GENERAL ZONING, SUBDIVISION, AND OTHER LAND USE REGULATIONS THAT WOULD CAUSE HARDSHIPS NOT SHARED BY ALL OWNERS.

A. Landowners who, because of special circumstances, are unfairly burdened by general zoning, subdivision, and other land use provisions, are allowed to seek variances permitting development that otherwise would be prohibited.

Property owners whose development plans are frustrated by zoning and subdivision requirements often seek relief from the local board of adjustment (or board of zoning appeals), an administrative body that

is authorized to grant or deny variances. Wisconsin's statute, which authorizes local boards of adjustment to consider variance applications, is typical:

> The board of adjustment shall have [the power]: . . .
>
> (c) To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done. . . .

Wis. Stat. § 59.694(7).

Similar to the protections afforded owners of nonconforming uses and the Respondents' "grandfather" provision for substandard lots, the variance is a device designed to make sure that property owners are not especially burdened by land use regulations. One authority observes that "[t]he granting of a variance has been called an 'escape valve' that is available when strict application of a zoning ordinance would result in an unnecessary burden on the landowner. A variance protects the landowner's rights from the unconstitutional application of zoning laws." Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* § 6.38 (2015) (footnote omitted). While "[t]he variance was developed early in the history of zoning out of a recognition that exceptions should be available from the strict application of zoning laws when necessary to correct maladjustments and to prevent inequitable or confiscatory

effects," according to a leading commentator, "the remedy provided by a variance is an extraordinary one that should be limited to those cases where unusual or exceptional circumstances exist to justify the deviation from otherwise applicable zoning laws." Patricia E. Salkin, *American Law of Zoning* § 13:1 (2016).

The Petitioners unsuccessfully sought six variances from the county board of adjustment, and that body's denials were upheld by the Court of Appeals of Wisconsin in *Murr v. St. Croix County Bd. of Adjustment*, 332 Wis. 2d 172, 178, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011). Key to the instant case was the board's denial of the Petitioners' variance from the merger provision ("variance to sell or use two contiguous substandard lots in common ownership as separate building sites"). *Id.* The state appellate court rejected the Petitioners' argument "that any existing substandard lot that was not under common ownership on January 1, 1976, remains forever exempt under the ordinance, regardless of whether it subsequently comes under common ownership with an abutting lot." *Murr*, 332 Wis. 2d at 181, 796 N.W. 2d at 843.

Rather than pursuing several other avenues for developing their property, *see* Brief in Opposition to Petition for Writ of Certiorari, *Murr v. Wisconsin*, No. 15-214, at 13-14 (Oct. 16, 2015), the Petitioners instead returned to court, and the result was another negative ruling by the Court of Appeals of Wisconsin, *Murr v. State*, 359 Wis. 2d 675, 859 N.W.2d 628 (Wis. Ct. App. 2014).

B. State law generally provides that, in the event that the hardship faced by the landowner is self-created or self-imposed, a variance will not be available.

It is not unusual to find in variance cases the notion that "hardships that are self-created will not support the grant of a variance." Patricia E. Salkin, *American Law of Zoning* § 13:16 (2016). Relying on precedent from the Supreme Court of Wisconsin, the state appellate court ruled that,

> because Murr is charged with knowledge of the existing zoning laws, as a subsequent owner she was already in a better position than any person who owned at the provisions' effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

Murr, 332 Wis. 2d at 184-85, 796 N.W. 2d at 844 (citing *State* ex rel. *Markdale Corp. v. Board of Appeals of Milwaukee*, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965)). While the Petitioners' knowledge of the merger provision would not *necessarily* bar a variance application (or a takings claim[4]), it is a factor that works against

---

[4] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). *See also*

any hardship assertion. *See, e.g.*, Patricia E. Salkin, *American Law of Zoning* § 13:16 (2016) ("In most jurisdictions, . . . purchase with knowledge is not a per se bar to obtaining a variance. It nevertheless remains relevant to the decision of whether to grant a variance.").

CONCLUSION

The zoning, subdivision, and other land use regulations promulgated by the state of Wisconsin and St. Croix County fit comfortably within the ambit of the police power. For nearly a century, this Court has accorded generous deference to state and local land use regulators who act to protect public health, safety, and general welfare, while respecting the private property rights of landowners. The state and county in the instant case have maintained the important balance between public need and private right. The familiar merger provision challenged in this case logically, practically, and legally treats as one parcel the two commonly owned subdivision lots that the Petitioners acquired after the effective date of the relevant regulation; and the county board of adjustment's consideration of Petitioners' variance application was in line with established principles of land use law.

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (identifying "reasonable investment backed expectations" as important factor in regulatory takings analysis).

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RECORD AND BRIEFS

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Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND
ST. CROIX COUNTY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

BRIEF OF *AMICI CURIAE* CALIFORNIA CATTLEMEN'S ASSOCIATION, AMERICAN FARM BUREAU FEDERATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, the California Cattlemen's Association, the American Farm Bureau Federation, and the National Federation of Independent Business Small Business Legal Center, submit this brief in support of petitioners Joseph P. Murr, et al. ("Petitioners").

The California Cattlemen's Association ("CCA") is the preeminent organization of cattle grazers in California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry. Formed in 1917 as a non-profit trade association, the CCA promotes the interests of ranchers both large and small in California. The CCA has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The CCA represents its members' interests before the California State Legislature, Congress and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

California is the third largest state in the union with almost 105 million acres of property. At 57 million acres, primary rangelands—meaning those lands suitable for the

---

1. The parties have consented to the filing of this brief. No counsel for a party authorized this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

grazing of livestock—make up nearly 57% of California. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2010 ASSESSMENT 53 (2010). Forty-three percent of these 57 million acres are in private ownership. CAL. DEP'T OF FORESTRY & FIRE PROT., CALIFORNIA'S FORESTS AND RANGELANDS: 2003 ASSESSMENT 67 (2003).

Owners of private rangeland are required to navigate the land use laws applicable to ranches that often consist of large-scale acreages sometimes stretching across multiple jurisdictions. These rangelands are typically held for the purposes of a family business and have been in the same family-operation for four or five generations. *See* Shasta Ferranto et al., *Forest and Rangeland Owners Value Land for Natural Amenities and As Financial Investment*, 65 CAL. AG. 184 (2011). For many ranches, the parcels have been acquired piecemeal over decades. STEPHANIE LARSON-PRAPLAN, CAL. RANGELANDS RESEARCH & INFO. CTR., HISTORY OF RANGELAND MANAGEMENT (2015). While there may be common ownership among these parcels, the individual holdings have been acquired separately and are often noncontiguous. Particularly in mountain areas, a rancher's deeded land may be interspersed with other leased lands; loss of one key parcel may affect the operational functionality of a large area. Inconsistency in land use law and the "takings" doctrine, especially the "parcel as a whole" question, creates a minefield for these private landowners as well as uncertainty for local land use regulators when faced with such large property holdings.

America's farmers own farmland in a manner similar to California's ranchers. The American Farm

Bureau Federation ("AFBF"), is an independent, non-governmental voluntary organization governed by and representing farm and ranch families nationwide. AFBF was formed in 1919 and has member organizations in all 50 states and Puerto Rico, representing about 6 million member families. AFBF member families are united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being. Just as the CCA represents the interests of ranchers who must navigate land use laws in California, so does AFBF represent the interests of ranchers and farmers nationwide. AFBF consequently shares an interest in the uniform application of the "takings" doctrine, especially the "parcel as a whole" question.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While

there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights are guaranteed meaningful protections. As such, this case raises an important issue for NFIB Legal Center.

SUMMARY OF ARGUMENT

Amici CCA, AFBF, and NFIB concur with Petitioners that the decision of the Wisconsin Supreme Court should be reversed.

Amici agree with Petitioners' important argument that property interests are defined by state law, and that Petitioners' "Lot E" was created pursuant to Wisconsin state law. *See* Petitioners' Opening Brief, p. 28. Property interests are not created by the Constitution; "'[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). The Takings Clause "protects property rights as they are established under state law." *Stop Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 732 (2010).

Each of the Murrs' parcels was created as a separate property under Wisconsin state law. That is the starting point for the Takings Clause analysis. A parcel, once created, gives its owner the bundle of rights that is the "property" protected by the Takings Clause.

ARGUMENT

I. STATE LAW DEFINES THE "PROPERTY" PROTECTED BY THE TAKINGS CLAUSE

The central question before this Court is how the "property" for regulatory takings analysis should be identified when there are two contiguous parcels, owned in common, and the state regulation precludes all development of one parcel.

Property rights did not originate in the Constitution. The historical precedent for property rights was brought to America by its English colonists and formed the basis for American law of property: "The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium." *Hage v. United States*, 35 Fed. Cl. 147, 151 (1996). This experience imbued early Americans with a distinct identity of individual rights, particularly the capacity to own property. According to John Adams, "[t]he Framers of the Constitution, by and large, subscribed to the Lockean view of the essential nature of individual property rights. ... Property must be secured or liberty cannot exist." JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996) (quoting 6 The Works of John Adams 280 (Charles Francis Adams ed. 1850)). In fact, the protection of private property was

a central aim of American government since its founding. As Alexander Hamilton explained at the Constitutional Convention of 1787, one "great ob[ject] of Gov[ernment] is [the] personal protection and security of Property." 1 Records of the Federal Convention of 1787, at 302 (Max Ferrand ed., 1911.)

Because property rights are specifically protected by the Constitution, even though those rights are not created by the Constitution, the courts must give substantial credence to protecting the property rights created by state common law and statutes. This Court has recognized this point in several takings cases. For example, in *Ruckelshaus v. Monsanto Co.*, this Court evaluated Monsanto's property right interests in its trade secrets. Similar to rights relating to real property, the Court noted that the "right to exclude others is central to the very definition of the property interest." 467 U.S. at 1011. In evaluating the Constitution's application to trade secret rights, the Court stated that, "we are mindful of the basic axiom that "'[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"" *Id.* (quoting *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 161).

Similarly, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, this Court expressly recognized that "[g]enerally speaking, state law defines property interests." 560 U.S. at 707 (citing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)). In evaluating the property rights at issue there, the Court concluded that, "[t]he Takings Clause

only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Id.* at 732. This Court has thus acknowledged the importance of defining the "property" for takings issue as the "property" created under state law.

II. EACH OF THE MURRS' PARCELS WAS CREATED AS A SEPARATE PROPERTY UNDER STATE LAW.

Turning to the issue in this case, it is important to note that it is state law that creates parcels of property, which are separated from adjoining properties by parcel lines.

For example, in California, real property is expressly controlled by California law. "Real property" is defined by the Civil Code to be coextensive with "lands, tenements and hereditaments." CAL. CIV. CODE § 14(2). It is subject to the jurisdiction of the state; California law therefore governs the acquisition, use, inheritance and transfer of California real property. CAL. CIV. CODE § 755.

In the instant case, the Murrs own two adjoining residential properties in the St. Croix Cove Subdivision. Similar to Wisconsin and many other states, California's Subdivision Map Act regulates and controls the design and improvement of all subdivisions in the state. CAL. Gov. CODE §§ 66410, *et seq.* At its most fundamental, the Subdivision Map Act provides for a large parcel of land to be lawfully broken into several smaller parcels or lots of land, each of which is considered a separate "property" under the law.

Thus, if a case like the Murrs' were to arise in California, the property owner's parcels would have been created under California state law. In the Murrs' case arising in Wisconsin, the Murrs' parcels were created under Wisconsin state law. Because each of the Murrs' parcels was created as a separate property under Wisconsin state law, each of the parcels should be considered a separate property under the Takings Clause. *See* Petitioners' Brief on the Merits, pp. 27-29; WIS. STAT. § 236.34(3) (recognizing that parcels of land in certified survey map shall be used "for all purposes," including conveyance).

The Takings Clause "protects property rights as they are established under state law." *Stop Beach Renourishment*, 560 U.S. at 732. The parcels that have been created by state law should be the starting point for Takings Clause analysis. A parcel, once created, gives its owner the bundle of rights that is the "property" protected by the Takings Clause.

CONCLUSION

The judgment of the Supreme Court of the State of Wisconsin should be reversed.

Respectfully submitted,

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In the
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JOSEPH P. MURR, ET AL.,
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v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,
Respondents.

ON WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

BRIEF FOR THE STATES OF CALIFORNIA, HAWAII, ILLINOIS, MAINE, MASSACHUSETTS, MINNESOTA, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should create a constitutional presumption that, in regulatory takings cases, separately titled adjacent lots under common ownership are to be analyzed separately when deciding whether a governmental regulation affecting one such lot unfairly deprives the owner of the use of his parcel as a whole?

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INTERESTS OF THE AMICI

Amici States are committed to preserving property owners' rights, as a matter of both federal and state law.[1] In exercising their police powers to promote the health, safety and well-being of residents, and to protect the environment, amici also consider the current and future regulatory needs of the community. State zoning laws, like other exercises of state regulatory authority, must honor both of these commitments. They seek to ensure that development occurs in a balanced manner, benefiting both property owners and the larger community.

Regulatory takings cases can turn in significant part on the definition of the parcel as a whole—the unit of property (and attendant rights) against which the impact of a regulation that restricts property use is measured to determine whether the regulation has effected a compensable taking. Petitioners and their amici would define the parcel narrowly, focusing on the single legal lot whose individual use is most restricted, rather than on a larger area under common ownership. That approach could both increase the number of cases in which a regulation affecting one legal lot may be deemed a "total" taking, and fundamentally change the analysis of other cases under *Penn Central Transportation Co. v. City of New York*,

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[1] *See, e.g.*, Cal. Const., Art. I, § 1 (listing, among people's "inalienable rights," the right to "acquir[e], possess[], and protect[] property"); Haw. Const., Art. I, § 2 (similar); Maine Const., Art. I, § 1 (similar); Mass. Const., Art. CVI (similar); *see also, e.g.*, Or. Const., Art. I, § 18 (takings clause); Wash. Const., Art. I, § 16 (takings clause).

438 U.S. 104 (1978), by increasing the proportion of burdened rights to remaining rights.

Those effects would unduly impair the States' ability to fulfill their role in the federal system. As a general matter, States have front-line responsibility for adopting reasonable, locally appropriate regulations affecting land use, public safety, environmental protection, and public health. Under petitioners' approach, States and localities would be forced to choose between forgoing necessary and constructive regulation that benefits the community and risking significant or even prohibitive financial exposure. The result would be to prohibit or discourage important regulatory programs that States have widely found necessary to the fulfillment of their public duties.

The particular type of regulation at issue in this case is a lot merger rule, under which adjacent commonly owned lots of substandard size are allowed less total development than would be allowed if the lots were separately owned. Such provisions have been in wide use across the country for decades.[2] They represent a considered judgment, on the part of the enacting States and localities, that vital community needs counsel against permitting new nonconforming uses of land where the circumstances of multiple-lot ownership make enforcement of current zoning requirements reasonable and fair. Such programs' effectiveness and viability would be severely restrained under petitioners' proposed view.

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[2] *See, e.g.*, Cal. Gov't Code § 66451.11; Mass. Gen. Laws ch. 40A, § 6; *see also* 06-096-1000 Me. Code R. § 12(E)(1); Minn. Stat. §§ 394.36(5)(c)-(e), 462.357(1e)(f)-(h); *see generally* National Association of Counties Br. 12-31.

Those consequences are neither compelled by this Court's precedent nor necessary to fulfill the Takings Clause's purpose. This brief addresses why, in defining the parcel as a whole, courts should not substitute a federal constitutional presumption of separate-lot analysis for the sort of facts-and-circumstances analysis that this Court has traditionally employed to analyze regulatory takings.

SUMMARY OF ARGUMENT

Petitioners propose that, in deciding whether a government regulation results in a taking of land, courts should presume that "the magnitude of government interference [with property rights] should be measured" by the regulation's effect on the landowner's ability to use "the fee title of the single parcel alleged to be taken," without regard to adjacent or nearby lots held by the same owner. Pet. Br. 12. Those wishing to argue against the presumption in a particular case would bear a "burden of proof"—with petitioners specifying neither the extent of that burden, nor the facts and circumstances that would suffice for rebuttal. *Id.*

That position is unsound. Outside of two extremely narrow categories, this Court has, in its regulatory takings decisions, rejected formalistic tests that single out a particular factor as dispositive. Instead, the Court has explained, regulatory takings analysis requires a fact-intensive inquiry into all pertinent factors of a particular case, to determine whether a regulation's effects on a particular property owner are so severe as to require compensation.

That sound approach requires rejecting petitioners' proposed answer to the question in this case. Where a claimant owns multiple adjacent properties,

focusing only or predominantly on the title description of a single fee-simple estate, to the exclusion or detriment of other factors, will frequently function poorly as a test for determining whether the application of a land-use regulation to the landholding is so extreme as to constitute a taking. Instead, as courts have found, numerous other factors may be equally or more important, depending on the facts of the case. For instance, one parcel, although subject to restricted development itself, may interact with the same owner's nearby parcel, such that the restrictions harm the landowner far less than a separate analysis of one parcel would imply. Or the physical characteristics, past use, and acquisition history of two adjacent parcels may indicate that the landowner had no reasonable investment-backed expectation that each lot would be separately developed.

Petitioners' proposed presumption is not justified by the traditional explanations for evidentiary presumptions. The government has no advantage in accessing and producing information relevant to regulatory takings claims; that advantage lies instead with the owner. Nor would the proposed presumption reflect any widely accepted underlying policy choice, in light of the large number of jurisdictions that have found that unitary treatment appropriately fulfills community needs while being fair to landowners. And petitioners have not shown that a federal constitutional presumption would accurately reflect owners' reasonable investment-backed expectations in most (let alone almost all) cases around the country. To the contrary, state and local laws may strongly affect the amount of independence that landowners ascribe to their parcels and the degree of permanence that they can reasonably ascribe to their

lot lines. A nationwide presumption would frustrate courts' ability to consider such local realities. And with respect to lot merger in particular, a history of widespread legislative judgment approving of such provisions as both necessary for the community and fair to landowners counsels against a constitutional presumption to the contrary. That conclusion is strengthened by the facts of this very case. If presumptions are to operate at all in this context, they should be created by local courts to reflect local realities, which petitioners' proposed rule does not do.

ARGUMENT

I. COURTS NEED THE FLEXIBILITY TO CONSIDER COMMONLY OWNED, ADJACENT LOTS AS ONE PROPERTY IN APPROPRIATE CASES

A. This Court Has Required Consideration of All Relevant Facts and Circumstances for Virtually All Regulatory Takings Questions

The "paradigmatic taking requiring just compensation" under the Fifth Amendment "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). "Beginning with [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)], however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Id.*

In applying that principle, however, this Court has "remain[ed] cognizant that 'government regula-

tion—by definition—involves the adjustment of rights for the public good,' and that 'Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" *Lingle*, 544 U.S. at 538 (citations omitted). "To require compensation in all such cases would effectively compel the government to regulate by *purchase*," which is not the Constitution's design. *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Regulatory takings doctrine thus "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. In approaching that inquiry, this Court has "focuse[d] directly upon the severity of the burden" that the regulation at issue "imposes upon private property rights." *Id.*

Only two "relatively narrow categories" of regulation, *id.* at 538, impose burdens that are inherently so severe as to warrant a per se rule requiring compensation: first, where the "government requires an owner to suffer a permanent physical invasion of her property," *id.*; and second, in a "'total regulatory taking[]'" which "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property" in ways not foreseeable under traditional law, *id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

In all other cases, this Court has found regulatory takings questions to be intensely fact-dependent. "The Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game &*

Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012). Because those "concepts of fairness and justice ... are less than fully determinate," this Court has, for decades, "eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (citations and internal quotation marks omitted)).[3] Instead, the Court has stressed, all relevant factors must be analyzed, and the outcome in any case will "'depend[] largely upon the particular circumstances [in that] case." *Id.* (internal quotation marks omitted).[4]

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[3] *See also Arkansas Game & Fish*, 133 S. Ct. at 518 ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."); *Lucas*, 505 U.S. at 1015 ("In 70-odd years of succeeding regulatory takings jurisprudence, we have generally eschewed any set ... formula for determining how far is too far, preferring to engag[e] in ... essentially ad hoc, factual inquiries." (internal quotation marks omitted)); *Eastern Enter. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion) (the inquiry, "by its nature, does not lend itself to any set formula," and is "essentially ad hoc and fact intensive"); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("this Court ... has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government").

[4] *See also Arkansas Game & Fish*, 133 S. Ct. at 518 ("most takings claims turn on situation-specific factual inquiries"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."); *Penn Central*, 438 U.S. at 124 (characterizing regulatory takings cases as "essentially ad hoc, factual inquiries," in which the result "depends largely 'upon the particular

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B. Determining What Constitutes the Parcel as a Whole Requires a Similar Multifactor Approach

Consideration of all relevant factors is similarly appropriate when determining in a given case what should be treated as the parcel as a whole—that is, the boundaries of the land that courts must take into account when they evaluate a regulation's effects on, and the remaining economic use available to, the landowner.

1. The Definition of the Parcel as a Whole Determines Much of an Overall Takings Inquiry

A court's determination of what constitutes the parcel as a whole will often determine the outcome of a regulatory takings case. Where a regulation would result in the elimination of all economic use of a narrowly defined lot, but not of the larger property of which it is a part, the determination of the parcel as a whole may be decisive as to whether a total taking has occurred requiring compensation under *Lucas*.[5] Even where a total taking is not alleged, evaluation of the regulation's effect on a property owner, and its compatibility with the owner's reasonable investment-backed expectations under *Penn Central*, may effectively turn on the parcel's definition. The regulation's impact on an owner's use of the larger unit

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circumstances [in that] case'" (alteration in original)).

[5] *Cf. Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993).

may be slight, while the effect on a smaller sub-unit seems more severe.

Employing a categorical or near-categorical rule to define the parcel as a whole would therefore undermine this Court's repeated acknowledgment of the need for flexible, fact-specific analysis in resolving regulatory takings claims. Courts would effectively decide the claim through the application of a rigid rule regarding what constitutes the parcel as a whole, rendering any remaining flexibility within the framework of little effect.

2. Courts Have Identified Numerous Factors Relevant to Determining the Parcel as a Whole

In deciding particular cases, courts have correctly noted numerous factors, in addition to the boundaries of a single estate, which bear on what should be treated as the parcel as a whole when a regulation affects one of a landholder's multiple properties. *See generally* Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 Vt. L. Rev. 603, 610-613 (2012).

Courts look, for example, to the properties' physical and geographic characteristics, including their contiguity. *See, e.g., District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 947 (D. Haw. 1986), *aff'd* 913 F.2d 573 (9th Cir. 1990); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Fed. Cl. 1991); *K&K Constr., Inc. v. Department of Nat. Res.*, 575 N.W.2d 531, 536 (Mich. 1998). They place weight on the his-

torical background of the properties' acquisition and use, *e.g.*, *District Intown*, 198 F.3d at 880; *Kaiser Dev. Co.*, 649 F. Supp. at 947, including the existence or nonexistence of plans for common development, *K&K Constr.*, 575 N.W.2d at 537. They can inquire as to "the extent to which the restricted lots benefit the unregulated lot." *District Intown*, 198 F.3d at 880; *see also Machipongo Land & Coal Co., Inc. v. Pennsylvania*, 799 A.2d 751, 768 (Pa. 2002); *Ciampitti*, 22 Cl. Ct. at 318. Or they may look for other "'factual nuances'" that reveal the "economic expectations of the claimant." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

3. Petitioners' Narrower Approach Would Overlook Key Factors

Anything other than a wide-ranging inquiry, responsive to the facts of the particular case, risks overlooking factors that are critical to evaluating whether a regulation's effect on one out of a number of adjacent, commonly owned lots is so significant as to be "tantamount to a direct appropriation or ouster," *Lingle*, 544 U.S. at 537, requiring the payment of compensation.

a. In many cases, for instance, an accurate determination of the impact on an owner's reasonable investment-backed expectations cannot be made without considering "the extent to which the restricted lots benefit the unregulated lot." *District Intown*, 198 F.3d at 880; *see also Ciampitti*, 22 Cl. Ct. at 318 ("the extent to which the protected lands enhance the value of remaining lands"); *Machipongo Land*, 799 A.2d at 768 ("the extent to which the regulated holding benefits the unregulated holdings").

In certain contexts, the fact that one lot is subject to restricted use will allow increased beneficial use of a co-owned adjacent lot—as when a parking lot increases the profitability of the business next door, *cf.* Nevada Br. 25 ("it is common for a restaurant or a store to use one lot as a place of business, and a contiguous lot for parking"), or where an adjacent vacant lot improves the solitude and privacy of a neighboring residence. Local regulations may also be relevant, since they may acknowledge the density-reducing effect of the vacant lot by allowing the owner to make increased use of his adjacent lot. In such scenarios, any diminution in the value of one property is accompanied by an increase in that of the other. If both properties have the same owner, then analysis of just one property can significantly overstate the regulation's actual effect on the owner.

Indeed, that appears to be the case here. Notwithstanding petitioners' allegation that one of their two lots has been deprived of virtually all economic value, a property appraisal evaluated the combined value of two separate buildable lots on the property at $771,100, and the value of one buildable combined lot as just 10% less. J.A. 58-59. That is because, as the appraiser recognized, an owner would enjoy greater water frontage on the two lots together than on either individual lot, and because purchasers are willing to pay a significant premium for the privacy and comfort of having what would function effectively as a large single lot.[6]

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[6] *See* Certified R., Doc. 17, at 49 (Williams Appraisal, at 41: "Given a preference, I believe there is no question that most buyers would prefer to have wide lots with more frontage. Wider lots enable larger homes, more outbuildings, more privacy, (continued...)

Of course, any diminution of value may be undesirable to the owner. But not all such effects will rise to the level of a taking. *See Lingle*, 544 U.S. at 538 ("[W]e must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good,' and that 'Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" (citations omitted)).

Indeed, *Penn Central* itself effectively viewed "[t]he relevant land" as "the aggregation of the owners' parcels subject to the regulation." *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., dissenting). The Court's determination that no taking resulted from the restriction of an owner's air rights rested, in part, on the offsetting effect of the City's grant of rights in other nearby parcels:

> [The owner's] ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, [some] of which have been found suitable for the construction of new office buildings... While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are

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more elbow room, and higher prestige.").

> to be taken into account in considering the impact of regulation.

Penn Central, 438 U.S. at 137.[7]

b. The history of the acquisition and use of legally separate parcels is often relevant to the analysis, particularly insofar as it sheds light on whether a regulation has unfairly affected an owner's reasonable investment-backed expectations. *See, e.g.*, *Forest Props.*, 177 F.3d at 1365 (considering the owner's treatment of the lots over time); *District Intown*, 198 F.3d at 880 ("the dates of acquisition" and "the extent to which the parcel has been treated as a single unit"); *Kaiser Dev.*, 649 F. Supp. at 947 ("unity of use," "historical considerations, and how the land has been treated both by the landowner and by the government").

In *District Intown*, for example, a property owner, in 1961, purchased a single parcel, consisting of an apartment building and landscaped lawn, on Connecticut Avenue across from Washington D.C.'s National Zoo. 198 F.3d at 877. The owner treated the property as one unit for decades. *Id.* In 1988, however, the owner subdivided the property into nine separate lots—one where the apartment building was, and the other eight formed by dividing the lawn. *Id.* When the owner's application for a permit to construct eight townhomes on the eight newly titled lots was denied because of the property's historic land-

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[7] *Cf. Suitum*, 520 U.S. at 749 (Scalia, J., dissenting) (disapproving of consideration of offsetting benefits conferred on non-adjacent parcels, but acknowledging that *Penn Central* correctly considered benefits conferred on adjacent parcels).

mark designation, the owner sought compensation under the Takings Clause. *Id.* at 877-878.

In evaluating both a *Lucas* total taking claim and a *Penn Central* claim, the court of appeals recognized as the key question whether the relevant parcel consisted "of the property as a whole" or whether "the eight lots for which construction permits were denied" should be treated individually. *Id.* at 879. In light of the lots' historically unitary purchase and ownership and their spatial and functional contiguity, the court found the lots to be "functionally part of the same property." *Id.* at 880. As a result, the court concluded, neither a total taking under *Lucas* nor a *Penn Central* taking had occurred, because the apartment building remained a productive use of the overall property and the owners were receiving a reasonable rate of return on their investment. *Id.* at 882-884. As *District Intown* recognized, the history of acquisition and use of multiple properties may say more than the lot lines alone about whether the owner's investment was premised on separate or unitary use.[8]

II. PETITIONERS' PROPOSED PRESUMPTION WOULD BE INAPPROPRIATE

Petitioners claim to seek not a per se rule but rather a presumption of separate treatment for lots under separate title. But if presumptions are appropriate at all in this context, they would need to

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[8] Indeed, ignoring such historical factors could encourage the manipulation of subdivisions and lot lines to gain takings compensation for properties that were *never* expected to be separately used.

be responsive to local expectations and needs. A nationwide constitutional presumption would therefore be inappropriate.

A. Petitioners' Presumption Is Unjustified in Light of the Characteristics of Regulatory Takings Disputes and Local Variation in Customs and Laws

Although presumptions are applied in the law for various reasons, *see* 2 Broun et al., *McCormick on Evidence* § 343 (7th ed. 2013), none of the traditional reasons justifies the constitutional presumption petitioners propose here.

"[S]ome presumptions are created to correct an imbalance resulting from one party's superior access to the proof" that is relevant to a claim. *Id.* But in disputes over the parcel as a whole any information asymmetry benefits the landowner. The government's pertinent records—statutes, regulations, and land records—are public. In contrast, the landowner is likely to have at her disposal private documents (and may assert personal knowledge) regarding her historical expectations and plans for the property. With respect to this traditional basis for presumptions, a presumption calculated to make the landowner produce the information that is specially in her possession would make more sense than any presumption about following lot lines per se.

Some presumptions reflect a policy judgment about who must bear the risk of an erroneous decision. In criminal trials, for instance, the presumption of innocence reflects a substantive commitment to avoiding the particular problem of erroneous convictions. *See In re Winship*, 397 U.S. 358, 364 (1970)

("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."). But where a legislatively created merger requirement is at issue, *see* pp. 18-20, *infra*, this rationale arguably supports a presumption in favor of following the statute, rather than petitioners' contrary presumption. Traditionally, the law defers to most legislative judgments balancing community and individual needs. *See Lingle*, 544 U.S. at 545.

Finally, the most common justification for a presumption is an empirical judgment that the presumption accurately reflects what is in fact likely to be true in most cases. *See* 2 *McCormick on Evidence* § 343 ("Most presumptions have come into existence primarily because ... proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it."). But petitioners' unsupported assertions do not show that a title description alone will in most cases accurately reflect owners' reasonable expectations—let alone that consideration of the title description alone would be more accurate than an analysis considering the title description along with other factors. Indeed, petitioners' own case illustrates the danger that their presumption would not accurately reflect a particular landowner's situation. *See* pp. 21-23, *infra*.

Petitioners' proposed presumption is particularly unlikely to match the needs of individual cases because it would operate nationwide, without respect to local variation in legal and historical circumstances. There is wide variation in state and local property law, and it is simplistic to assume that state legal regimes and customs would necessarily lead landown-

ers throughout the country to regard individual parcels as inherently separate. *See, e.g., Town of Franklin v. Metcalfe*, 30 N.E.2d 262, 265 (Mass. 1940) (in Massachusetts, "'[c]ontiguous parcels of land, though divided upon a plan for purposes of sale, may often be assessed as a unit'" for tax purposes); *Preston v. Board of Appeals*, 744 N.E.2d 1126, 1128 (Mass. App. Ct. 2001) ("even before the advent of zoning laws, where contiguous parcels were conveyed as separate parcels, the whole tract constituted one 'lot' for purposes of determining attachment of a mechanic's lien"); *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 829-830 (Minn. Ct. App. 1994) (treating multiple lots "as one for purposes of liens accruing in consequence of building," because under longstanding precedent a "lien extends to a 'lot' as defined by the way the property is used rather than the way it is platted").

The history of subdivisions and land recording varies across jurisdictions, which have developed particular rules to address particular problems.[9] Depending on the jurisdiction, land can be subdivided and lot lines adjusted with varying degrees of formality and public review, which could also affect the degree of reliance that a property owner should reasonably place on any expectation of separate use.[10] And the boundaries of a particular lot can

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[9] *See, e.g., Gardner v. County of Sonoma*, 29 Cal.4th 990, 994-995 & n.1 (2003) (addressing status of 1865 subdivision which was recorded before enactment of California's 1893 Subdivision Map Act).

[10] For example, in California, owners may adjust lot lines between adjoining parcels as a ministerial matter, so long as four or fewer parcels are affected, the resulting lots are conforming, and the adjustment results in no greater number of

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change as well through the operation of local law regulating subjects such as adverse possession.

It is possible to envision presumptions responsive to such local factors, which might be justifiably established by local courts. *See, e.g., Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006) (presuming that contiguous properties in Massachusetts constitute a single parcel as a whole). But the existence of extensive local variation would make the adoption of a national, constitutionalized rule unwise.[11]

B. Widespread Legislative and Judicial Approval of Lot Merger's Utility and Fairness Counsels Against Petitioners' Presumption

As the National Association of Counties has explained, lot merger ordinances are widespread, longstanding tools for promoting the kind of community, land-use, and environmental goals that lead governments to mandate minimum lot sizes. *See* 3

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parcels. *See* Cal. Gov't Code § 66412(d); Barclay & Gray, *Curtin's Land Use & Planning Law* 79 (34th ed. 2014).

[11] Petitioners also err in attempting to ground their presumption on assertions about the understandings of only a particular class of owners. Petitioners assert that individual owners and families understand rights in one lot to be wholly separate from rights in another. Pet. Br. 27. It is not clear why that would be so. But even if it were true, the presumption petitioners propose would apply as well when compensation is sought by sophisticated corporate owners advised by well-paid counsel—another factor which suggests that it would be unwise to create a broad national presumption that would be applicable to all cases.

Rathkopf's The Law of Zoning and Planning § 51.12 (4th ed. & Supp. 2016) (explaining that lot-size requirements protect water supplies, safeguard environmentally sensitive areas, prevent erosion and pollution, control traffic, and preserve property values); National Association of Counties Br. 5-12. Legislative bodies view lot merger provisions as a way to balance fairness to individual owners with the community's interest in phasing out substandard lots for the common benefit. *See Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015) (zoning requirements, merger provision, and grandfathering clause were "designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property"); National Association of Counties Br. 11.

State legislatures across the country have therefore either provided for lot merger themselves, or empowered local governments to enact lot merger ordinances.[12] We are not aware of any court that has found the operation of such a provision to effect a taking. To the contrary, courts have rejected such claims. *See e.g., Sibley v. Inhabitants of Wells*, 462 A.2d 27, 31 (Me. 1983) (rejecting a takings claim premised on merger, because the regulated lot "has substantial use and value in conjunction with the adjacent lot"); *Tekoa Constr., Inc. v. City of Seattle*, 781 P.2d 1324, 1328-1329 (Wash. Ct. App. 1989). Taken together, the decisions of democratically elected representatives and state court judges reflect a widely

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[12] *See, e.g.*, Cal. Gov't Code § 66451.11; Mass. Gen. Laws ch. 40A, § 6; Minn. Stat. § 394.36(5)(d); N.M. Stat. § 47-6-9.1; R.I. Gen. Laws § 45-24-38; Vt. Stat., tit. 24, § 4412(2)(B).

held judgment that merged treatment is fair to the majority of landowners and accords with property owners' likely expectations. *See, e.g., Giovanella*, 857 N.E.2d at 458 ("Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property."); 56 Op. Cal. Atty. Gen. 509, 513 (1973) (current "community standards with respect to lot design, area, improvements, flood, sewer, and similar requirements" may be reasonably applied to commonly owned adjacent parcels in some circumstances where it would be "oppressive" to apply them to smaller separately owned parcels). To disregard these careful local judgments in favor of a presumption of separate treatment would require far more justification than petitioners set forth.

Countless communities and property owners, moreover, have relied on these legislative and judicial decisions in ordering their affairs. *See* National Association of Counties Br. 14-31 (listing examples of local ordinances). Indeed, some landowners have presumably made their investment decisions in particular communities based on the expectation that nonconforming lots would be eased out over time through the operation of lot merger provisions—a reasonable expectation, given the widespread and largely unchallenged existence of such provisions. Adopting petitioners' proposed presumption would afford petitioners' purported expectations special protection over the reasonable expectations of countless other citizens, property owners, and communities.[13]

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[13] The problem is not solved by the fact that petitioners term their presumption "rebuttable." Pet. Br. 24-26. Petitioners do not explain the level or kind of proof that would be sufficient to rebut their presumption. If the presumption could be

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C. Petitioners' Own Case Illustrates Why Their Presumption Is Unwarranted

Petitioners own two adjacent properties: Lot E (which is currently vacant) and Lot F (which has a cabin). Pet. Br. 3-4. They complain that county zoning ordinances effectively prevent them from building on or selling their Lot E property. *Id.* at 5-6. They believe that restrictions on Lot E should be analyzed without regard to their remaining ability to use Lot F (or Lot E in combination with Lot F), such that their present inability to separately build on or sell Lot E amounts to a taking of that lot. Pet. App. A-5. When examined closely, petitioners' own case undercuts their argument that a presumption of separate treatment can be assumed to reflect the facts of most cases.

1. As amici understand the facts, separate analysis of the two lots would not reflect how the restrictions on Lot E actually work. It appears that St. Croix County's zoning laws do not in fact prohibit petitioners from building on Lot E. Although those laws prohibit them from building two houses on Lots E and F, that leaves petitioners with several options for the use of Lot E. *See generally* Pet. App. A-12.

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easily or routinely rebutted, then petitioners' proposal would do little to increase efficiency and predictability, since courts and parties, though entertaining the presumption, would still be required to give all due weight to the numerous other relevant factors. If, on the other hand, the presumption is strong enough to require that properties be treated as separate even where the totality of circumstances does not support that characterization, then petitioners have not explained any overriding interests which make it necessary to tolerate such erroneous results.

They could replace their Lot F cabin with a new structure on Lot E, or with a single structure built on both lots. *Id.* at 12-13.

Even if petitioners choose instead to maintain their existing structure exclusively on Lot F, they will still, as an objective matter, derive significant benefit from their adjacent Lot E in their use of Lot F. A vacant Lot E provides Lot F with added beachfront and open space, resulting in a property appraiser valuing the combined lot as only ten percent less valuable than two individually built-on lots. *See* p. 11 & n.6, *supra*. And, like their neighbors, petitioners also benefit from the overall density limits the community has adopted, which reduce congestion, protect the environment, and increase property values as a whole in the vicinity. There is no reason to believe that these factors are unique to petitioners' case. Rather, it is likely that in many lot merger cases, the combined lot may enjoy offsetting advantages that must be carefully analyzed in light of the precise regulatory regime and property at issue.

2. The chronology of petitioners' and their predecessors' ownership and use of the properties also undercuts any claim that their presumption would accurately reflect facts on the ground.

Even where a land-use law imposes new restrictions on the use of property, that does not necessarily create a taking. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (upholding application of the then-*new* "[b]uilding zone laws"). As a result, an owner's reasonable investment-backed expectations must include the expectation that future zoning adjustments may alter the allowable use of their land.

But a claim of interference with reasonable investment-backed expectations is even weaker where the application of the restrictions at issue stems from actions the owner took after the regulation was already in place, as seems to be the case here. The St. Croix merger ordinance that affects petitioners' development rights as common owners of Lots E and F was enacted in 1975. Pet. Br. 5. At that time, however, the ordinance had no effect on petitioners or their predecessors, because the lots were not in common ownership. *See id.* at 3-4. As a result, for years after the ordinance's enactment, Lot E's owner apparently retained, under St. Croix's law, the ability to sell Lot E or to build on it. The merger ordinance became operative on these properties only because of the decision—after the ordinance was in place—to place both lots in common ownership.

Petitioners propose a constitutional presumption which would invite courts, in similar cases, to ignore the possible relevance of such considerations in determining whether the merger ordinance is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. This Court should decline the invitation. *Cf. Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (it would be "error to expunge" from the analysis consideration of "the timing of the regulation's enactment relative to the acquisition of title").

III. NEVADA'S ARGUMENTS DO NOT STRENGTHEN THE CASE FOR PETITIONERS' PRESUMPTION

Amici Nevada et al. make three additional arguments that deserve brief comment. First, Nevada

contends that an approach centered on individual parcels is necessary to respect the text and original understanding of the Takings Clause. Nevada Br. 4-5. But Nevada points to nothing showing that those who adopted the Fifth or Fourteenth Amendments had any view regarding the definition of the relevant parcel—and the regulatory takings doctrine in fact postdates those Amendments' adoption. The Takings Clause's text requires the payment of compensation only when "the government *acquires* private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." *Tahoe-Sierra*, 535 U.S. at 321 (emphasis added). Because the Constitution "contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property," *id.* at 321-322, it is difficult to see how a particular approach to implementing the regulatory takings doctrine, whatever its merits or flaws, could violate the Framers' intent. *See generally Eastern Enter.*, 524 U.S. at 540 (Kennedy, J., concurring) (noting that the 1922 decision in *Mahon* broke new ground in holding that regulation might support a takings claim in the absence of physical appropriation).

Second, Nevada argues that without an analysis centering on individual lots, States will be tempted to overregulate in ways that inhibit the beneficial use of land. Nevada Br. 21-25, 28-29. But States and localities have a vital interest in the productive, efficient use of land, which provides employment, housing, and other benefits for their residents, and tax revenues to fund government itself. Local communities, through their elected representatives, can and do consider whether particular regulatory requirements

undercut those goals. Petitioners' proposed nationwide presumption would add nothing to their efforts.

Finally, Nevada claims that its approach is necessary to safeguard States from abusive regulatory takings of state-owned land by the federal government. *See* Nevada Br. 25-28 (hypothesizing that the United States could "under some pretense, ... bar[] all or most development on all property owned by Nevada in Lincoln County"). But Nevada points to no example of the federal government attempting anything of the sort. As noted above, States and localities have enacted their land use laws (including merger ordinances of the type considered here) to address vital matters of public concern. To hamstring them in those real-life efforts in order to prevent a purely theoretical form of federal overreach would not advance federalism. To the extent issues of intergovernmental relations are of concern, they should be addressed as such in some appropriate case.

CONCLUSION

The decision of the Court of Appeals of Wisconsin should be affirmed.

Respectfully submitted,

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RECORD AND 1 BRIEFS

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In The

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY, et al.,

Respondents.

On Writ Of *Certiorari* To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF CARLISLE FORD RUNGE, DANIEL W. BROMLEY, JAY COGGINS, DAVID E. ERVIN, NOELWAH R. NETUSIL, RAYMOND B. PALMQUIST, AND R. WILLIAM PROVENCHER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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The economists identified below respectfully submit this brief *amicus curiae* in support of Respondents.

THE INTEREST OF *AMICI*

The *amici* have no personal stake in the outcome of this case.[1] Their interest is in helping the Court understand how regulatory restrictions affect the value of land insofar as these insights may help the Court to analyze this takings claim involving a lot merger zoning provision. Joining in this brief are the following professors of economics whose teaching and research have focused on the effects of regulations and other government actions on private property interests:

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[1] This brief is filed with the written consent of all the parties. Pursuant to Supreme Court Rule 37.6, *amici* state the McKnight Foundation, a Minnesota-based family foundation, made a financial contribution to support the preparation and submission of this brief; no other person or entity, including any party or any counsel for a party, made a financial contribution to fund the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part.

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SUMMARY OF ARGUMENT

Regulations have both negative and positive effects on the value of private land. Regulations have a negative "development" effect by limiting what can occur on a specific parcel of land. At the same time, regulations have a positive "amenity" effect by protecting the attributes of an area that make it an attractive place to live and invest. In addition, regulations have a positive "scarcity" effect by restricting the amount of development that can occur in an area, making each remaining development opportunity – and each already developed property – more valuable than they

would be in the absence of regulation. As numerous precedents of this Court recognize, the *net* economic effect of restrictions on regulated properties can only be determined by counting *both* the positive effects and the negative effects of regulation.

Economic analysis suggests that St. Croix County's lot merger provision meets the Court's standard of "fairness and justice" because it allows owners of adjacent substandard lots to make reasonable use of their property while denying them an opportunity to reap a windfall not available to their neighbors. In general, allowing an owner of a substandard lot to build in violation of a minimum lot size requirement means the owner incurs none of the negative development effects of the zoning while reaping the positive amenity and scarcity effects of the zoning. This result may be justified as necessary to avoid the economic wipeout that would result from strict enforcement of the zoning. But a case involving two adjacent substandard lots is quite different than a case involving a single substandard lot. Allowing an owner to build in violation of the zoning on two adjacent substandard lots would mean the owner still incurs none of the negative development effects – while reaping the positive benefits of the zoning. As a result, the owner of the lots would receive a windfall not available to owners of comparably-sized properties in the same zoning district. On the other hand, enforcing a lot merger provision avoids conferring a windfall on the owner of adjacent substandard lots, while guaranteeing that such an owner can make the

same use of his or her property as other owners of comparably-sized properties.

A lot merger provision is a "fair and just" solution – indeed it is arguably the best solution from an economic standpoint – to the question of how to apply minimum lot size requirements to commonly owned adjacent substandard lots.

ARGUMENT

I. Economic Theory Predicts that Regulatory Restrictions Will Have Both Negative and Positive Effects on the Value of Regulated Private Lands

It is sometimes assumed – in everyday conversation, political discourse, and some judicial opinions – that regulatory restrictions on permitted uses of privately-owned land invariably have negative effects on the value of land. But regulatory restrictions also have positive effects on land values. The *net* effect of restrictions on regulated properties can only be determined by counting both the positive and the negative effects. Disregarding the positive effects of regulation on property values, either in individual cases or in a set of cases, risks creating inaccurate estimates of regulations' effects on property values.

On one side, legal restrictions on permitted uses of private land may reduce its value by prohibiting or restricting what can occur. Economists have called this the "development effect." *See, e.g.*, Noelwah R. Netusil,

The Effect of Environmental Zoning and Amenities on Property Values: Portland, Oregon, 81 Land Econ. 227, 228 (2005). The proceeds ("rent") that can be earned from owning a tract of land influence its economic value. Restricting the most profitable use of land, all else equal, will reduce its value. The magnitude of the development effect will vary with location and market conditions. In an urbanized area with keen competition for development sites, restrictions can have a substantial development effect. Beyond the urban fringe, where land markets are largely influenced by agricultural or forestry production, the development effect may be modest. A further complexity is that regulatory restrictions in one community may have second-order effects on land values in other communities, especially those close by. *See* Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 Vt. J. Envtl. L. 437 (2010).

On the other side, the negative effects of a regulation may be offset by the positive "amenity effects" of the same regulation. *See id.* at 438. Regulation that applies to all or a substantial portion of a community (zoning being the quintessential example) not only restricts what one owner can do on her land but also what neighbors can do on *their* lands. For example, a zoning ordinance may limit the permitted density of development in a portion of the community. Such a regulation may limit congestion and preserve the scenic and natural attributes of the area, making it an attractive place to live and invest. By preserving amenities

that make an area attractive to buyers, land use regulations raise property values above those that would prevail in their absence.

In addition, negative development effects may be offset by a third effect of regulatory restrictions, known as the "scarcity effect." In general, any limitation on the supply of a good or service will tend to increase its market value. The scarcity effect in a takings context was recently discussed by Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit in *Callahan v. City of Chicago*, 813 F.3d 658 (7th Cir. 2016). The case involved a takings challenge to a city regulation limiting the rates that taxi cabs can charge riders. Owners of taxi medallions, Judge Easterbrook observed, derived value from the city's limit on the number of medallions issued. These limits "produc[ed] a regulatory scarcity that offsets the effect on owners of capping what they can charge." *Id.* at 660. Data showing recent increases in medallion values, despite the regulation of taxi fares, "impl[ied] the absence of confiscatory regulation." *Id.* In short, regulations that create scarcity can increase the value of private property.

In the context of real property interests, regulations that limit land development, in particular density controls, can increase the value of regulated lands due to the scarcity effect. Jeffrey A. Michael & Raymond B. Palmquist, *supra*, at 438. For example, a property owner able to build ten single-family units on her land under prior law, who is subject to a new regulation

limiting the number to eight, may benefit from adoption of the regulation. A restriction on the permitted density of development throughout a community or a substantial portion of a community reduces the total number of development opportunities, making each remaining opportunity to engage in development more valuable because it is scarcer. Thus, even though reducing the permitted number of units to eight prevents the construction of two units, each of the eight units remaining may be more valuable, so that the value of the sum of eight may exceed that of ten. For the same reason, new regulations may increase the value of already developed properties; by restricting opportunities to engage in new development, regulations limit the future supply of developed properties, making already developed properties more valuable.

It is important, however, to distinguish between the effects of regulations on developed versus undeveloped land. For developed property, if the owner does not intend to further develop it (such as a typical single family homeowner in a residential zone), the effects of the adoption of heightened regulatory standards are likely to be positive (and only positive) due to both amenity and scarcity effects. By contrast, if the owner holds undeveloped land, new regulatory restrictions are likely to have negative development effects as well as positive amenity and scarcity effects. How the positive scarcity and amenity effects and the negative development effects will net out will depend on the circumstances of the case. As a matter of theory, it is indeterminate whether the net effects are negative or

positive. As Professor Laura Underkuffler has explained:

> [L]and use-regulation – including significant land use restrictions – affect land values in often unpredictable ways. They might (as conventionally predicted) decrease values in some cases, but they might increase land values in others.

Laura S. Underkuffler, *Takings and the Problem of Value: Grappling with Truth in Land-Restriction Cases*, 11 Vt. J. Envtl. L. 465, 467 (2010).[2]

II. Empirical Studies Confirm that Regulations Have Both Negative and Positive Effects on Land Values.

The theoretical complexity discussed above is borne out in empirical studies. Most studies estimating the impacts of government action on property values use forms of "hedonic analysis," in which the influence of different characteristics of property, such as the number of bedrooms in houses or whether the property is located in a flood plain, are used to explain variations in property values. *See* Sherwin Rosen, *Hedonic*

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[2] Government actions also positively influence property values in other ways, including public infrastructure investments, subsidy programs, and other "givings." Tracing these effects is no more complicated than determining how regulatory restrictions negatively affect property values. *See* Laura S. Underkuffler, *supra*, at 475 (observing that "[a]ssessments of benefits conferred by government would be no different – if the motivation were there – than assessment of government detriments").

Prices and Implicit Markets: Product Differentiation in Pure Competition, 82 J. Pol. Econ. 34 (1974). One of the characteristics that can be examined in hedonic studies is the regulatory restrictions that apply to land.

Representative examples of hedonic studies examining land use regulations include:

- A study of lakefront zoning restrictions in Wisconsin concluded that larger minimum lakefront requirements for second-home residential development resulted in a net increase in lakefront property values. The authors found that the average per-foot value of lakefront property subject to a 200-foot minimum frontage rule was 21.5% greater than the average per-foot value of properties subject to a 100-foot minimum frontage rule, suggesting that the positive amenity effect of such zoning outweighed the negative development effect. Fiorenza Spalatro & Bill Provencher, *An Analysis of Minimum Frontage Zoning to Preserve Lakefront Amenities*, 77 Land Econ. 469 (2001).

- A study of the effect of development restrictions on agricultural land in three Maryland counties (Calvert, Carol, and Howard) found no statistically significant evidence that restrictions adversely affected sales values. Although the authors found a slight correlation between development restrictions and lower land prices, they concluded that "preservation did not appear to significantly reduce

sales prices from unpreserved parcels." Cynthia Nickerson & Lori Lynch, *The Effect of Farmland Preservation Programs on Farmland Prices*, 83 Am. J. Agric. Econ. 341(2001).

- A study of sales prices of undeveloped properties in Baltimore County, Maryland, found no difference in the value of land zoned for one house per five acres vs. one house per 50 acres. The authors concluded that there was no statistical difference between the per-acre value of five-acre land and of 50-acre land, and could not even determine whether greater restrictions tended to increase or decrease land values. They speculated that, "with the spread of subdivisions over the countryside in the larger metropolitan areas, lands that are protected from subdivision by zoning may sell at a premium." In other words, according to the authors, "buyers may be willing to spend more for protection from development." Applied Data Resources, Inc., on behalf of the Maryland Environmental Trust, Report to the Valleys Planning Council on the Trading Value of RC-2 Zoned Land Compared with RC-4 Zoned Land in Northern Baltimore County (1996).

- A study of properties around the Chesapeake Bay in Maryland subject to the Chesapeake Bay Critical Area Law, adopted by the Maryland legislature in

1986, concluded that the law had no discernible adverse effects on property values. The authors found that over the six-year study period vacant land values did not decline, while the value of developed residential properties increased significantly. W. Patrick Beaton & Marcus Pollock, *Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay*, 68 Land Econ. 434 (1992).

- A Study of properties in the New Jersey Pinelands subject to the New Jersey Pineland Protection Act concluded that the legislation imposed no "wipeouts" on property owners, including owners of undeveloped land in the most restricted areas of the Pinelands, but conferred considerable "windfalls" on some owners within the management area. The authors found that over the 20-year study period the Act produced a significant differential in the rate of appreciation of developed versus vacant properties, with developed properties appreciating at a faster rate than vacant properties. However, the authors also found that the values of the most restricted lands in the Pinelands area increased in value more over the study period than properties in a control area. W. Patrick Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, 67 Land Econ. 172 (1991).

- A study of trends in agricultural land values in Maryland counties with agricultural zoning restrictions found no evidence that the zoning restrictions reduced property values. A private consulting firm prepared the study for the State of Maryland Planning Office, primarily to address the concern that zoning restrictions might reduce farmers' equity in their lands and limit their ability to borrow money. The study looked at trends in sales prices of agricultural properties over periods of a decade or longer in four counties that had adopted agricultural zoning (Anne Arundel, Baltimore, Carroll, and Montgomery) and in two counties that had not adopted such restrictions (Cecil and Howard). The authors concluded that the data revealed no specific trends in land values due to restrictive zoning ordinances and, more specifically, provided no evidence of decreases in land values in counties with agricultural zoning. Robert J. Gray et al., Resource Management Consultants, Inc., The Effects of Agricultural Zoning on the Value of Farmland (1991).

- A study of the effect of exclusive agricultural zoning in Rock County, Wisconsin under the Wisconsin Farmland Preservation Law concluded that agricultural zoning had both positive and negative effects and that the effects varied with parcel characteristics and other factors. The authors examined 120 farmland parcels

> sold in either 1980 or 1981. They concluded that the net effect of zoning depended on the zoning classification, parcel size, and distance from urban centers. According to their results, "agricultural zoning is positively capitalized into land prices for large farmland parcels somewhat removed from urban areas, parcels without much development potential." On the other hand, "[s]maller agricultural parcels relatively close to an urban area sold for a higher price if unzoned, indicating a negative capitalization effect." David M. Henneberry & Richard L. Barrows, *Land Capitalization of Exclusive Agricultural Zoning into Farmland Prices*, 66 Land Econ. 249 (1990).

These and other empirical studies of the effects of regulatory restrictions on the value of regulated private lands are discussed in greater detail in Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restrictions and Property Values*, 11 Vt. J. Envtl. L. 437, 450-62 (2010); and William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 Environmental Law 105, 115-17 (2006).

III. The Court's Precedents Recognize that Regulatory Restrictions Have Both Positive and Negative Effects on the Value of Regulated Lands

Careful economic analysis is essential to principled application of the Takings Clause, especially in

the regulatory takings context. As the Court has explained, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, "[e]ach of the [Court's regulatory takings] tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 540 (2005). When the alleged burden involves a diminution of the value of regulated private property, a method that accurately calculates how regulation affects value is needed.

Court precedent acknowledges that government regulations in fact have both positive and negative effects on property values. *See Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by [land use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."). In shorthand, the Court has adopted the term "reciprocity of advantage" to describe the economic benefits accruing to regulated property owners from their neighbors' compliance with regulations that apply to all. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). The Court has acknowledged that because regulations have both positive and negative effects, accurate measurement of economic impact must account for both. *See Agins v. City of Tiburon*, 447 U.S. 255, 262 (1987) ("In assessing the fairness of the zoning ordinance, these benefits [conferred on the plaintiff by the

zoning] must be considered along with any diminution in value that the [plaintiffs] might suffer."). Court precedent thus establishes that it is the *net* economic effects of a regulation that must be considered in determining whether a compensable taking has occurred.

The Court has recognized that consideration of the positive effects – as well as negative effects – of regulation should influence the outcome of regulatory takings cases. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1017-18 (observing that most regulations can properly be described as "adjusting the benefits and burdens of economic life . . . in a manner that secures an average reciprocity of advantage to everyone concerned") (internal citations and quotations omitted); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (referring to the "average reciprocity of advantage that has been recognized as a justification of various laws").

The Court has applied the reciprocity of advantage concept by factoring into the analysis of economic impact the benefits generated by the specific regulation being challenged as a taking. For example, in *Agins v. City of Tiburon*, *supra*, the Court affirmed the rejection of a takings claim based on a zoning ordinance restricting minimum lot sizes, reasoning that:

> [t]here is no indication that the [plaintiffs'] 5-acre tract is the only property affected by the ordinance. [The plaintiffs] therefore will share with other owners the benefits and burdens of

> the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in value that the [plaintiffs] might suffer.

447 U.S. at 262. Similarly, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court rejected a takings claim based on a development moratorium in the Lake Tahoe basin, relying on the same net benefit-cost reasoning:

> [W]ith a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. . . . At least with a moratorium there is a clear "reciprocity of advantage," . . . , because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted.. . . . In fact, there is reason to believe property values often will continue to increase despite a moratorium. . . . Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state.

Id. at 341 (internal citations omitted). *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 135 (1978) (rejecting a takings challenge to New York City's Landmarks Law in part because plaintiff had "been benefited by the Landmarks law"). *Cf. Hodel v.*

Irving, 481 U.S. 704, 715 (1987) (upholding a takings claim but recognizing that the "reciprocity of advantage" created by the statute weighed strongly *against* the claim).

As the foregoing precedents show, the Court has recognized that the net economic benefits of regulation should be considered in determining whether or not a regulation represents a "taking." This approach is consistent with the fact that the economic impact of a regulation – the touchstone of regulatory takings analysis – can only be assessed based on the sum of the negative and positive effects of a regulatory restriction. Some of Petitioners' *amici* suggest that the economic benefits of regulation should count, if at all, in addressing whether the plaintiff is entitled to just compensation and if so in what amount, assuming the court has already determined that a taking has occurred. *See, e.g.*, Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners, at 9 (referring to the "'average reciprocity of advantage' exception" to takings liability). This alternative approach is inconsistent with the economic analysis, empirical examples and previous reasoning of the Court described above.

While the Court typically focuses on the positive effects of the specific regulation the owner is challenging as a taking, it has also articulated a broader conceptual version of reciprocity of advantage. In *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984), quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979), the Court said that its analysis of takings claims starts

from the premise that citizens must bear most economic burdens "as concomitants of 'the advantage of living and doing business in a civilized community.'" In the same vein, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), the Court stated:

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Id. at 492 n.21. The California Supreme Court has also embraced this broad version of the reciprocity concept: "[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good." *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 675-76 (2002).

This broad conception of reciprocity of advantage highlights the difficulty of accounting for all of the positive and negative effects of regulation on property

value. Restrictions imposed on owners of buildings in an historic district subject to historic preservation rules can confer benefits on owners of properties in an adjacent area whose compliance with other regulations, such as density rules, confer benefits on everyone else in the community, including the owners in the historic district. It is difficult to calculate all of the offsetting benefits and burdens with precision. But the challenge of doing an exact accounting cannot justify ignoring the positive effects of regulation nor can it obviate the need to consider broadly shared reciprocal benefits and burdens in the context of takings law.

While the reciprocity of advantage concept (in either a narrow accounting or broad conceptual version) is central to takings law it is not the only relevant economic consideration under the Court's takings jurisprudence. For example, the transactions costs of administering a system of compensation for economic losses caused by government action weighs against attempting to remedy all such losses under the Takings Clause, as the Court has observed: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967) (observing that the magnitude of "settlement costs" are relevant in designing an economically rational compensation scheme).

Furthermore, takings analysis encompasses more than strictly economic factors. The threat of harm due to a regulated activity is generally recognized as a relevant factor in takings analysis even if it is not accountable in economic terms. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1026, citing *Keystone Bituminous Coal Assn.*, 480 U.S., at 513-14 (Rehnquist, C.J., dissenting) (observing that, at least in cases not involving regulations eliminating "all economically viable use," the harmfulness of the regulated activity has been recognized as a relevant consideration in takings analysis). In addition, the "right to exclude" is protected by the Takings Clause even though impairment of that right may produce minimal economic harm. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). While sound economic analysis is essential to the logical, principled application of the Takings Clause, modern takings doctrine is obviously also about more than economics.

Despite the complexities of modern regulatory takings analysis, the central issue in most regulatory takings cases remains the degree of diminution in property value (if any) caused by a regulation. And for that purpose, for all the reasons discussed above, both the negative and positive effects of regulation must be counted.

IV. Appraisal Evidence Purporting to Show that Regulations Adversely Affect Property Values is Misleading

The foregoing analysis leads to an important observation about modern takings litigation: The method ordinarily used by litigants and courts to determine whether and to what extent regulation reduces property value is fundamentally misleading. As discussed, the "economic impact" of a regulation is a central issue in most regulatory takings cases. The usual way to measure economic impact for the purpose of takings litigation is to obtain appraisals from experts concerning the value of the property "without the regulation" and "with the regulation," and then to subtract the latter figure from the former to arrive at an estimate of the "loss" in value due to the regulation. This is commonly referred to as the "with and without" or "before and after" appraisal methodology. While estimating the value of the property "with the regulation" is relatively straightforward (it is simply the current market value of the property subject to the current regulation), estimating the value of the property "without the regulation" is far more difficult. In fact, the usual method for estimating this figure yields an inflated number, which in turn leads to an inflated estimate of the diminution in value due to regulation.

"The most common appraisal technique is to examine a small group of comparable sales. . . . , [which] identifies a small number (typically three) of recently sold properties that are most like the property being appraised." Jeffrey A. Michael & Raymond B.

Palmquist, *Environmental Land Use Restriction and Property Values*, 11 Vt. J. Envtl. L. 437, 450 (2010). Once "comparable" properties have been identified, appraisers typically make "adjustments in value" to account for characteristics that make particular properties more or less valuable than the one being evaluated. *Id.* Appraisers hired by plaintiff and defendant typically develop independent estimates of the value of the property "with" and "without" the regulation: they then use these figures to generate independent estimates of the "loss" in value due to the regulatory restrictions. The trier of fact is left to sort out any conflicts over the valuation evidence.

In this case, the parties and the trial court used this traditional approach to determine whether and to what extent the Murrs suffered a "decline" in the value of their property due to the zoning regulation. Plaintiffs' appraiser compared the value of Lot E assuming it could be developed with the value of Lot E assuming it could not be developed. *See* Cert. Rec., Docket No. 21, pp. 69-88 (appraisal prepared by Timothy Williamson). Defendants' appraiser compared the value of Lots E & F combined assuming they both could be developed with the value of the two lots assuming only one could be developed. *See* Cert. Rec., Docket No. 17, pp. 3-149 (appraisal prepared by Scott Williams). Despite these differences, both sides used the same basic appraisal methodology: They attempted to estimate the value of the property "without regulation" by looking at the market value of other "comparable," developable riverfront properties along the St. Croix River.

The problem with this customary approach, which is not consistent with the approach economists use to estimate the effect of regulation on property value, is that it yields an inflated estimate of the value of the property "without the regulation." Following the usual method, the comparables used in this case were based on the sales prices of other similar, developable properties along the St. Croix River in the general vicinity of the Murr property. But the value of these comparables necessarily reflects the positive amenity and scarcity effects of the zoning regulation that gave rise to this takings dispute. Using a figure based on this type of comparable to estimate the value of the property "without" the regulation is misleading because the value of the comparable is inflated by the regulation's scarcity and amenity effects. In other words, this methodology is inherently flawed because it assumes that the regulation will remain in place for everyone else, and then asks what the value of the claimant's property would be if he or she were granted a special exemption from the restrictions that apply to everyone else. *See* William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 Environmental Law 105, 107 (2006).

The correct approach to estimating the value of the property "without the regulation" would be to determine what the value of a claimant's property would be if the regulation had not been adopted and did not apply to anyone in the community. Calculated in this fashion, the "without regulation" value would reflect

neither the negative development effect of the regulation nor its positive amenity and scarcity effects. Only by approaching the economic impact issue in this net and holistic fashion can the analysis capture both the positive as well as the negative effects of regulations on property value. Unfortunately, this type of counterfactual analysis of land value is far more time-consuming and difficult to perform than a simple with-and-without appraisal. In fact, in the context of a specific takings case arising from the rejection of a particular development proposal, it may well be nearly impossible to determine what the value of the property would be if a regulation had never been adopted and did not apply to anyone.

Furthermore, the standard appraisal method will invariably indicate that a regulation has reduced a property's value regardless of whether the actual net effect of the regulation is negative or positive. *See id.* at 126 ("Evidence that the value of an individual exemption [from] a land use regulation is positive does not, by itself represent proof or unequivocal evidence that the enactment of the land-use regulation reduced the property's value."). An individual property will invariably have a higher value if a regulatory restriction is lifted from that specific property. But this does not alter the reality that adoption of a new regulation across an entire community will have both positive and negative effects and may well have a net positive effect on individual properties. As a result, the appraisal technique will sometimes suggest that a regulation has reduced a property's value even when, considering

all of the relevant effects, "the regulation has raised the property value." *Id.* at 107.

In sum, it is clear that a simple before-and-after or with-and-without calculation of property values using standard appraisal techniques will often generate figures that overstate the actual adverse effect (if any) of a legal restriction on the value of restricted property. Beyond that, the standard appraisal technique will invariably indicate that regulation has a negative effect on property value, even if the actual net effect is neutral or even positive. This is not to suggest that the use of appraisal evidence is necessarily illegitimate in takings cases; appraisals may be the only readily available (albeit flawed) evidence of the effect of a regulation on property value. But sound economic thinking underscores the importance of great caution in the use of appraisal evidence and suggests the need for the Court to disavow the "fantasy" that "restrictions imposed on land invariably reduce land's value." Laura S. Underkuffler, *Takings and the Problem of Value: Grappling with Truth in Land-Restriction Cases*, 11 Vt. J. Envtl. L. 465, 476 (2010).

V. The Lot Merger Provision Allows Petitioners to Make Reasonable Use of Their Land While Not Conferring an Economic Windfall on Them.

Focusing on the *Murr* case in particular, the foregoing economic analysis supports the conclusion that St. Croix County's lot merger provision does not likely

impose any economic burden on Petitioners and probably avoids conferring an economic windfall on Petitioners which is not available to their neighbors.

A comprehensive system of land use regulation governs the permitted uses of the Murr property and other private lands bordering the St. Croix River. The St. Croix National Scenic Riverway, which stretches for a total of 252 miles, is commonly divided into two segments, the Upper St. Croix and the Lower St. Croix. In 1968, Congress enacted the Wild and Scenic Rivers Act, designating 200 miles of the Upper St. Croix and its tributary the Namekagon River as one of the initial components of the national Wild and Scenic Rivers System. P.L. 90-542, § 2(b)(6). In 1972, Congress passed the Lower St. Croix River Act, adding the Lower St. Croix River to the system. P.L. 92-500. The 1972 legislation immediately added the 27-mile upper portion of the Lower St. Croix to the system, *id.*, § 2, and authorized the Secretary to designate the 25-mile lower portion of the Lower St. Croix upon approval of an application for such designation by the Governors of Minnesota and Wisconsin. *Id.* The Murr property is located in the lower portion of the Lower St. Croix River. Today, the entire Lower St. Croix is jointly managed by the National Park Service, the Minnesota Department of Natural Resources and the Wisconsin Department of Natural Resources. *See* Lower St. Croix Cooperative Management Plan (January 2002), https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf. (The Upper St. Croix, which is comparatively undeveloped and includes substantial areas of public

land, is administered by the National Park Service. *See* National Park Service, Upper St. Croix and Namekagon Rivers, General Management Plan (1998), https://www.nps.gov/sacn/learn/management/upload/SACN_1998_GMP.pdf)).

In 1974, to help carry out the objectives of the national Wild and Scenic Rivers Act, as well as "to ensure the continued eligibility of the Lower St. Croix river for inclusion in the national wild and scenic rivers system," Wisconsin enacted Ch. 197, Laws of 1973, entitled "AN ACT to create s. 30.27 of the statutes, relating to preservation of the lower St. Croix river and granting rule-making authority." Ch. 197, effective May 7, 1974, was codified at WI Stat. § 30.27. The legislation directs the Wisconsin Department of Natural Resources ("DNR") to promulgate "guidelines and specific standards" for local government zoning ordinances along the length of the Wisconsin side of the Lower St. Croix River. *Id.* The guidelines were promulgated as Wisconsin administrative rules in the Wisconsin Administrative Code, Chapter NR 118, Standards for the Lower St. Croix National Scenic Riverway. The current version of ch. NR 118 appears at http://docs.legis.wisconsin.gov/code/admin_code/nr/100/118. The rules divide the Wisconsin side of the Lower St. Croix riverway into five "management zones": river town; small town; small town historic; rural residential; and conservation. *Id.*, NR 118.04. The majority (86%) of the Wisconsin Lower St. Croix Riverway area is designated either rural residential zone or conservation zone, with a minority of the lands (14%) included in the other three

zones. Cooperative Management Plan, at 28-29. The Murr property is located in the "rural residential" zone under the DNR rules.

The DNR rules prescribe various standards for local government zoning ordinances, including restrictions relating to permitted uses, building density, building height, building setback, and so forth. Consistent with the Lower St. Croix Cooperative Management Plan's descriptions of the "rural residential" zone ("no large concentrations of development or people") and the "conservation" zone (a "largely natural scene"), *see* Cooperative Management Plan, at 25-26, relatively more stringent standards apply in these zones than in the other three zones. Of particular relevance to this case, the DNR rules allow the minimum lot size requirements in the river town, small town, and small town historic districts to be determined by "the local riverway ordinance." NR 118.06(1)(a). By contrast, the DNR rules mandate that lots in the rural residential and conservation zones "shall have at least one acre of net project area." *Id.* "Net project area" is defined as "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." NR 118.03(27). As a result of this definition, a property owner will commonly need to own more than one acre to build in conformity with the rules.

In accordance with the DNR guidelines, St. Croix County adopted a Riverway Overlay District ordinance, which applies to the unincorporated riverfront lands in the County. *See* http://www.co.saint-croix.wi.us/vertical/sites/%7BBC2127FC-9D61-44F6-A557-17F28

0990A45%7D/uploads/Ch_17_SUBCHAPTER_III.V_Riverway(1).pdf. All of the lands subject to the ordinance are included in either the rural residential or conservation zones under the DNR rules. The County ordinance specifies, in accordance with the DNR guidelines, that for all lands subject to the ordinance the "[m]inimum net project area for each lot shall be at least one acre." *Id.*, Section G.1.

The river-protection regulations of St. Croix County are complemented by similar land use regulations adopted by other jurisdictions that border the Lower St. Croix River. For instance, on the Wisconsin side of the river, other counties in addition to Lower St. Croix County have adopted zoning rules to conform to the DNR Scenic Riverway rules. *See, e.g.*, Polk County Lower St. Croix Riverway Ordinance, http://www.co.polk.wi.us/vertical/sites/%7BA1D2EAAA-7A29-46D6-BF1A-12B71F23A6E1%7D/uploads/LowerStCroixRiverwayOrdinance.pdf. On the Minnesota side of the river, Minnesota, like Wisconsin, responded to the enactment of the national Lower St. Croix River Act of 1972 by adopting its own Lower St. Croix Wild and Scenic River Act. *See* Minn. Stats. § 103F.351. That act directs the Minnesota Department of Natural Resources to issue rules which, like the Wisconsin rules, set minimum standards for local zoning by individual communities along the river. Minnesota Administrative Rules, Department of Natural Resources, § 6105.0380. For example, the Minnesota rules specify a minimum lot size of "not less than 2½ acres" in "rural districts." As in Wisconsin, local governments are responsible for the

actual administration of the land use regulations. *See* Minnesota Department of Natural Resources, *Lower St. Croix River: A National Wild and Scenic Treasure*, http://files.dnr.state.mn.us/publications/waters/lower_st_croix_brochure.pdf. In sum, the States of Wisconsin and Minnesota, working in concert, have established a comprehensive regulatory program governing land development along the length of both sides of the Lower St. Croix River.

The Wisconsin DNR rules state that one of their purposes is to "maintain property values" along the Lower St. Croix River. NR 118.01. In light of the economic analysis in the preceding sections of this brief, this objective is entirely sensible and achievable, despite the fact that the County regulations impose relatively stringent restrictions on development to preserve the scenic and recreational values of the river. On the one hand, the St. Croix County land use regulations have a negative development effect insofar as they restrict property owners from developing or otherwise using their land along the river in a fashion that would be permitted in the absence of the regulations. On the other hand, the County regulations, by themselves and as supplemented by regulations adopted by other jurisdictions in Wisconsin and Minnesota, create a positive amenity effect by preserving the scenic beauty of the Lower St. Croix River corridor that makes it an attractive place to live and own property. In addition, these regulations produce a scarcity

effect by limiting the amount of development, increasing the values of existing properties and legally approved building sites. For the reasons described above, the net effect of these burdens and benefits is difficult to estimate, but there is no *a priori* reason to believe that the regulations have a net negative effect on land values along the Lower St. Croix River.

Petitioners are owners of substandard lots that do not meet the applicable minimum lot size requirement. In a typical case involving a substandard lot, to enforce the minimum lot size requirement against the owner of the lot could preclude any substantial economic use of the lot. However, to waive the minimum lot size requirement based on the lot's dimensions could undermine the goals of the zoning, in this case protection of the scenic and recreational qualities of the Lower St. Croix River. Presented with this choice, St. Croix County, as authorized by the DNR guidelines, NR 118.08, has adopted a "grandfathering" provision waiving the minimum lot size requirement for substandard lots. Riverway Overlay District ordinance, *supra*, Section I.4. This case is complicated, however, by the fact that Petitioners own two *adjacent* substandard lots. Thus, this case raises the question of whether Petitioners should receive two waivers (one for each lot), or should be restricted to one house on the two lots. The County's Riverway Overlay District ordinance requires "merger" of adjacent substandard lots for zoning purposes, and Petitioners sued alleging a "taking," claiming that each lot should be regarded as the relevant

"property" for the purpose of takings analysis. Petitioners contend, in effect, that as a matter of constitutional doctrine, they should be entitled to build on both substandard lots, and if they are barred from building on one of their lots they should be entitled to financial compensation for the "burden" imposed on them by the regulation.

The preceding economic analysis suggests that allowing Petitioners to build on both substandard lots is not necessary to avoid imposing an economic burden on them. In fact, it suggests that that allowing them to do so would confer an economic windfall on Petitioners not available to other riverfront property owners. The owner of a substandard lot allowed through grandfathering to develop in a manner inconsistent with current zoning suffers no adverse development effect. But like other property owners in the community, she enjoys the positive amenity and scarcity effects created by the zoning. A grandfathered lot owner thus receives only economic benefit from the zoning regulations whereas owners of other properties in the community experience a mix of positive and negative effects. The holder of the grandfathered lot can appropriately be regarded as receiving a windfall relative to other property owners. Such a windfall, even if arguably "unfair" in some sense, can be defended as necessary to avoid inflicting a "wipeout" on the owner of a pre-existing substandard lot by strict enforcement of the zoning.

But when, as in this case, the owner possesses two *adjacent* substandard lots, the results of the analysis are quite different. Granting waivers for each of the

lots would mean that the owner, again, would be solely benefited by the zoning regulation. As in the single substandard lot case, the owner would gain from the positive amenity and scarcity effects resulting from the neighbors' compliance with the minimum lot size requirements. The only distinction is that the size of the windfall would increase if the owner were permitted to build on two substandard lots rather than just one. At the same time, the owner would incur none of the burden imposed by the zoning regulation, because she would be allowed to develop both lots in disregard of the zoning. On the other hand, if the lot merger provision is enforced, and the owner is allowed to develop one lot but is denied permission to develop the other, she is both benefited and burdened by the regulation, just like other owners subject to the zoning rules. She is benefited because her opportunity to develop the property is made more valuable by the regulatory restrictions on other properties in the community. But she is also burdened because she is subject to the same restriction – per unit of land area – as other owners. In sum, under a lot merger provision, an owner is treated the same as other similarly situated owners and is denied an economic windfall not available to other property owners.

An example will help illustrate the point. Assume three neighboring land owners along the river own four acres, two acres and one acre respectively. If one-acre residential zoning is enacted, the owners are allowed to build four, two and one unit of housing on their properties; each owner is allowed to build one

house per acre. Assume instead four neighboring landowners who own four, two, one and one-half acres of land. Applying a substandard lot provision, the owner of the one-half acre lot would be permitted to build, even though this will detract from the zoning plan and the owner will reap the economic benefits of the zoning while incurring none of the burden; this outcome can be justified as necessary to avoid a wipeout. Finally, assume three neighbors who own four, two and one acres, and a fourth neighbor who holds two adjacent half-acre lots. Under a lot merger provision, the owner of the two adjacent substandard lots would be permitted to build one house per acre, just like her neighbor who also owns one acre; both owners would be equally burdened and benefited by the restrictions in economic terms. But if the lot merger provision were declared unconstitutional, and the owner were permitted to build on both lots, the owner would be permitted to build at twice the density of the neighbor who also owns one acre of land; and the owner of the substandard lots would reap the benefits of the zoning while avoiding all of the burden.

This reasoning suggests that the County's lot merger statute is eminently "fair and just" in the sense that it imposes no greater net economic burden on the Petitioners than on neighbors up and down the river. Indeed, it is arguably the *most* "fair and just" solution to the question of how to apply minimum lots size requirements to commonly owned adjacent substandard lots, because it avoids allowing Petitioners to build at a higher density than their neighbors and it thereby

avoids conferring a unique economic windfall on them. Stated differently, a constitutional rule that mandated that the County allow development on both adjacent lots would produce gains for the Petitioners that can only be described as arbitrary. Were courts to ignore the common ownership of adjacent substandard lots, they would privilege those who own separate but contiguous properties over those who own a single property of size equal to the two contiguous parcels.

More generally, this analysis points out the hazard implicit in the narrow approach to the relevant property (or "denominator") issue advocated by Petitioners and their *amici*. Defining the relevant property based on the entirety of a contiguous tract allows a court to consider those portions of the property which have been particularly benefited by the regulation as well as those portions of the property which have been especially burdened. But the more latitude takings claimants are accorded to define the parcel narrowly, the greater the risk that land owners will reap the economic benefits of regulation while simultaneously seeking "just compensation" from the public by focusing largely if not exclusively on the burden imposed by regulation.

CONCLUSION

For the foregoing reasons, the *amici* economists urge the Court to affirm the judgment below.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

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INTEREST OF *AMICI CURIAE* AND INTRODUCTION[1]

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1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years.

Amici urge the Court to reverse the Wisconsin Court of Appeals. That court incorrectly permitted the government to effect a taking of Petitioners' property by combining separate but contiguous parcels of land they own to create a new "parcel as a whole" under the regulatory takings analysis of *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). Landowners challenging government actions that affect their property already face an uphill climb under *Penn Central*. Adding another layer of uncertainty—asking whether contiguous parcels should be combined—would only complicate that analysis further. The Wisconsin court's holding also creates larger parcels of land, making it easier for the government to effect uncompensated takings. The Court should thus adopt a bright-line rule against combining separate properties to create a "parcel as a whole."

SUMMARY OF THE ARGUMENT

This Court first outlined the test for regulatory takings in *Penn Central*. Although ubiquitous, it is a notoriously difficult test to apply. Its three factors—(1) the "character of the government action," (2) the regulation's economic impact, and (3) the regulation's interference with "reasonable investment-backed expectations"—have perplexed courts and litigants for decades.

The *Penn Central* factors are vague and difficult to apply to concrete property interests. As a result, courts

have considered the factors differently depending on the case, treating one factor as dispositive in one case while ignoring it altogether in others. The factors themselves are also circular. A landowner's "investment-backed expectations" will necessarily depend on existing regulatory regimes, so the "character of the government action" shapes a landowner's expectations.

The Court has attempted to clarify *Penn Central*, *see, e.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005), but these efforts have been inadequate. For example, the Court has acknowledged that notions of "fairness and justice" drive the analysis. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001). This opaque overlay to the *Penn Central* factors only worsens the ambiguity. The Court's failure to clarify the meaning of each factor, or how each should be weighed, has solidified the widely held view that the *Penn Central* test is a muddled area of the law.

This situation is further exacerbated by the fact that landowners rarely prevail in regulatory takings cases. One empirical study found that landowners lose 90 percent of regulatory takings claims. *See* F. Patrick Hubbard *et al.*, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company?, 14 Duke Envtl. L. & Pol'y F. 121, 141 (2003). In many cases, the impact of such losses can be staggering, with landowners losing almost all of the value of their properties without receiving compensation.

The focus of this case is the "parcel as a whole" inquiry embedded in the *Penn Central* analysis. Whether a regulation amounts to a taking hinges in large part on the "extent of the interference with rights in the *parcel*

as a whole." *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (emphasis added). Thus, before courts can begin to address the intrusiveness of a regulation, they must first define the scope of the affected property. To that end, the size of the property often dictates the severity of the regulation's impact; the smaller the piece of property, the more severe an impact the regulation will likely have. The issue presented in this case is whether courts can combine adjacent parcels to create a new "parcel as a whole" simply because the two parcels have the same owner.

The Court should adopt a bright-line rule against aggregating separate parcels under common ownership. Such a rule would add much-needed clarity to the *Penn Central* test by simplifying the analysis. The lower courts' various tests for when to aggregate parcels are just as complicated as the *Penn Central* test itself. *See, e.g.*, *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013). Attempting to articulate a new test for aggregating parcels, instead of adopting a bright-line rule against it, would only complicate *Penn Central* further.

More importantly, a rule against aggregation would serve to protect landowner rights. Respecting the separation of distinct parcels would ensure that the impact of a regulation is measured against the proper piece of impacted property. As a result, prohibiting aggregation would make it more likely that landowners would receive compensation for onerous regulations. A bright-line rule would also protect landowners' reliance interests on their property lines. This Court has long recognized the benefits of stable property rights. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). The ability to

rely on expectations in property interests encourages investment, development, and the accrual of wealth. States themselves have protected such reliance interests by adopting various zoning protections, such as the "vested rights doctrine" and "nonconforming uses." A bright-line rule against aggregating separate parcels would do the same.

On the other hand, a rule permitting aggregation of parcels would exacerbate *Penn Central*'s failings. Indeed, simply permitting aggregation *at all* undermines property interests and makes it more likely that landowners will lose regulatory takings claims because the relevant "parcels as a whole" will be larger. This case is an excellent example of that dynamic. After building a cabin on Lot F, the Murrs purchased the adjacent Lot E for investment purposes. But the county blocked them from building on or selling Lot E, dashing any plans the Murrs may have had for the land. Making matters worse, state courts combined the two properties based on their common ownership. That converted a categorical taking of Lot E, for which the Murrs would at least have received compensation, into an uncompensated burden the Murrs must bear.

The losses that the Murrs and other owners of contiguous properties have suffered are particularly troubling because of the arbitrary nature of the government actions. When governments combine separate parcels of property in this manner, they target those who choose to invest in contiguous pieces of property. This haphazard system can only be described as a form of the maligned "reverse spot zoning." Worse yet, the uncertainty created by such aggregation destabilizes landowners' reliance interests. The complicated tests

for aggregation make it more difficult for landowners to predict the impact of future regulations and the outcome of subsequent takings claims. This in turn discourages landowners from purchasing contiguous properties or investing in properties they already own.

Instead of undermining property interests and further muddling the *Penn Central* analysis, the Court should adopt the most natural "parcel as a whole" rule: preexisting, state-drawn property lines should define the relevant parcels. And states should be prohibited from combining contiguous parcels under common ownership when landowners pursue regulatory takings claims.

ARGUMENT

Separate Parcels of Land Should Not Be Aggregated Under *Penn Central* for Takings Analysis Purposes.

A. The *Penn Central* Test Is a "Muddle" That Inadequately Protects Property Rights.

The *Penn Central* test governs almost all regulatory takings cases. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). That test is not a "set formula" but instead relies on "several factors that have particular significance." *Id.* (quoting *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978)). "Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id.* (citation omitted). Also relevant is the "'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property

interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* (citation omitted). In short, "*Penn Central* is a balancing test that considers three factors: (1) the character of the state action; (2) the economic impact of the regulation; and (3) the regulation's interference with the owner's investment-backed expectations." Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Cir. B.J. 677, 677 (2013).

"If there is a consensus today about regulatory takings law, it is that it is highly muddled." John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006 (2003). The Court itself has joined that consensus, noting that the *Penn Central* factors have "given rise to vexing subsidiary questions," *see Lingle*, 544 U.S. at 529, and admitting that it has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking," *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Court has further said that the analysis is "characterized by 'essentially ad hoc, factual inquiries." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (citation omitted). Finally, this Court has also acknowledged the subjective nature of the analysis, noting that it relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 349 (1986). In short, "[c]ases attempting to decide when a regulation becomes a taking are among the most ... perplexing in current law." *Eastern Enter. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

Numerous deficiencies in the *Penn Central* analysis lead to this "muddle." At the outset, the language the Court uses to articulate the test is notoriously vague and generally unhelpful to lower courts. Although the Court has repeated the *Penn Central* formula many times, it "has provided little guidance on the meaning and proper application of these three factors." John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 171-72 (2005). And the meaning of the factors seems to change from case to case. In that regard, the Court has identified "nine plausible definitions of the term of 'character.'" *Id.* at 186 (labeling the Court's varying definitions of "character" a "veritable mess"). At different times, the Court has applied the "character" of the state action prong to focus on factors such as: the public interests served by the regulation, *see, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); whether the regulation benefits the property owner by similarly restricting other property owners (the so-called "average reciprocity of advantage"), *see, e.g.*, *id.* at 491-92; whether the regulation restricts the right to devise the property, *see, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 716 (1987); whether the regulation has retroactive effect, *see, e.g.*, *Apfel*, 524 U.S. at 537 (plurality); and whether the regulation remedies a harm caused by the landowners' own actions, *see, e.g.*, *id.* (explaining that a taking may be less likely when the regulation fixes an injury caused by the landowner).

Moreover, "[t]he regulation's economic effect upon the claimant may be measured in several different ways." *Dist. Intown Props. P'ship v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999). For example, the Court has looked at the market value of the property, *Hodel*,

481 U.S. at 714; whether the regulation makes a business "commercially impracticable," *DeBenedictis*, 480 U.S. at 495–96; whether there are other economic uses to which the property can be dedicated, *Andrus v. Allard*, 444 U.S. 51, 66, 100 (1979); and whether the property can earn a reasonable rate of return, *Penn Central*, 438 U.S. at 136. Suffice it to say, the *Penn Central* factors have substantial definitional problems. Echeverria, *supra*, at 178-99 (attempting to reconcile the Court's varying decisions on the *Penn Central* factors).

The Court's failure to clarify the meaning of these factors has "perpetuat[ed] the essentially ad hoc approach to takings analysis and contribut[ed] to the widespread view that regulatory takings is an especially confused field of law." Echeverria, *supra*, at 171-72. The factors have been "affirmed repeatedly as the eye of the needle through which millions of words have been jammed with little agreement among courts about how to analyze the three step test." William Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 Envtl. L. Rep. News & Analysis 10936, 10936 (2011). Ultimately, the lack of clarity "invites [courts] to engage in open-ended value judgments." J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 104 (1995).

In addition, the factors are themselves circular. "[E]ach of the principal elements of *Penn Central* depends on the others for content and meaning." Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 604 (2014). A landowner cannot have "reasonable investment-backed expectations" in a jurisdiction that already has plenary regulations

because new regulations are more predictable. "[E]xcept for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations." *Intown*, 198 F.3d at 887 (Williams, J., concurring). So the "nature of the government action" influences precisely what expectations are "reasonable." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("[I]f the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."); *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring) ("[T]he nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations.").

Complicating matters further, "[t]he Court ... has never ... explained how th[e] factors should be weighted." Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 7 (2003). Are courts to weigh each factor equally or is one factor dispositive? The Court's own decisions suggest that "the weight to be afforded conclusions under any separate category must itself depend on the facts of the particular case." Byrne, *supra*, at 104. For example, in *Hodel*, the court found the "character of the governmental action" to be dispositive, 481 U.S. at 716, while in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court found the "investment-backed expectations" factor to be "so overwhelming ... that it disposes of the takings question," *id.* at 1005.

Over time, the Court has attempted to clarify the analysis. *See, e.g.*, *Lingle*, 544 U.S. at 540 (holding after decades of confusion that "due process" considerations have "no proper place in our [regulatory] takings jurisprudence"). But these efforts have ultimately failed. The Court has emphasized that the purpose of the Takings Clause is to promote "fairness and justice." *Palazzolo*, 533 U.S. at 617-18; *Tahoe-Sierra*, 535 U.S. at 333-34, 342; *Lingle*, 544 U.S. at 537. And the *Penn Central* analysis itself should be "informed" by that purpose. *Palazzolo*, 533 U.S. at 617-18; *see also* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20-FALL Kan. J.L. & Pub. Pol'y 1, 3 (2010) (explaining that *Palazzolo*, *Tahoe-Sierra*, and *Lingle* "confirmed that the takings question ultimately concerns 'fairness and justice,' and that courts should apply the *Penn Central* test in this light"). This "fairness and justice" overlay to the *Penn Central* test has made it even more ambiguous, and it has exacerbated rather than clarified the test. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("The concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate."). What remains is more difficult to apply. *See* Cordes, *supra*, at 4-5 ("[B]oth the *Penn Central* test itself, as well as notions of 'fairness and justice,' are hardly meaningful guideposts to assess whether a restriction constitutes a regulatory taking.").

The arbitrariness of *Penn Central* is particularly problematic because it places a substantial obstacle in the way of landowners who challenge government actions affecting their properties. Indeed, empirical studies show that landowners lose over 90 percent of their takings claims under *Penn Central*. *See* F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under*

the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company*?*, 14 Duke Envtl. L. & Pol'y F. 121, 141 (2003). This drastic imbalance in litigation outcomes suggests that *Penn Central* is a poor protector of property rights.

A survey of cases confirms as much. Lower court decisions applying *Penn Central* often conclude that no taking has occurred despite extreme diminution in value. *See, e.g.*, *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (finding that an 89.5 percent diminution in value is not a taking); *Nasser v. City of Homewood*, 671 F.2d 432, 435, 438 (11th Cir. 1982) (finding a 52.6 percent diminution not to be a taking); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386, 1388-90 (N.J. 1992) (finding a 92 percent diminution not to be a taking); *Walcek v. United States*, 49 Fed. Cl. 248, 271-72 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (finding a 59.7 percent diminution not to be a taking).

The *Penn Central* factors are difficult to understand and to apply, and they obstruct the ability of landowners to obtain just compensation for government regulation of their properties. In other words, "the law is muddled, though the muddle never quite seems to stop the government from winning." Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1644 (2003).

B. A Bright-Line Rule Against Combining Properties to Create a New "Parcel as a Whole" Would Mitigate *Penn Central*'s Failings.

The *Penn Central* analysis hinges in part on the "extent of the interference with rights in the *parcel as a whole*." *Penn Central*, 438 U.S. at 130-31 (emphasis added). Therefore, before courts can begin to navigate the *Penn Central* analysis they first must define the scope of the affected property. *See Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) ("[T]he definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation."). The issue in this case, of course, is whether courts can combine adjacent parcels to create a new "parcel as a whole."

The Court should adopt a bright-line rule that preexisting, state-drawn property lines define the "parcel as a whole." And the Court should not permit efforts by governments to combine adjacent properties simply because they share an owner. A bright-line rule would add some clarity to the *Penn Central* analysis because it would be simple to apply in practice. For the most part, "state law defines property interests." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010). The most basic of those interests is the metes and bounds of the property. *See id.* at 707-09 (explaining how state law defined the boundaries of privately owned land); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."). Courts can easily rely on those same boundaries when defining the relevant "parcel as a whole."

This method of defining the "parcel as a whole" is the most natural test. *See* Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. Pa. J. Const. L. 20, 81 (1998) ("[R]esolution of this issue of parcel definition seems fairly straightforward: identify the relevant parcel as the entirety of the originally purchased tract."). In fact, this Court has already once defined the "parcel as a whole" in this way, noting that the "interest in real property is defined by the metes and bounds that describe its geographic dimensions." *Tahoe-Sierra*, 535 U.S. at 331. Such an approach would plainly be feasible as states and localities already rely on property lines in other contexts. For example, many states provide that separate, contiguous parcels under common ownership should be treated as separate parcels for tax valuation and assessment purposes. *See, e.g., Edward Rose Bldg. Co. v. Indep. Twp.*, 462 N.W.2d 325, 330 & n.4 (Mich. 1990); *Theobald v. Cty. of Lake*, 712 N.W.2d 180, 183 (Minn. 2006). States could easily apply the same standard in regulatory takings claims. Although such a bright-line rule would not solve *Penn Central*'s other infirmities, at least it would not make matters worse.

Perhaps more importantly, a bright-line rule against aggregation will help level the playing field. Under the current legal regime, it is extremely difficult for landowners to prevail in regulatory takings claims. *See, supra*, at 11-12. It would become even more difficult to do so when governments can aggregate separate properties into one. "The determination of what constitutes the 'parcel as a whole' in a given case often is outcome determinative, because regulatory takings law measures the claimant's loss with respect to the relevant parcel." Eagle, *supra*,

at 631; *Intown*, 198 F.3d at 880 ("The definition of the relevant parcel profoundly influences the outcome of the takings analysis."). The size of "[t]he relevant parcel impacts the severity of a regulation's economic impact—the factor that largely determines whether a regulatory taking has occurred." Laura J. Powell, *The Parcel as a Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases*, 89 Wash. L. Rev. 151, 159 (2014). "[T]he larger the relevant parcel, the smaller the regulation's economic impact will be on the property" and the "less likely a court will find a taking has occurred." *Intown*, 198 F.3d at 885 (Williams, J., concurring); *see also* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 414 (2003) ("Size matters in a takings case."). Combining two separate parcels into one creates a larger parcel, thus reducing the apparent economic impact of the applicable regulation. As a result, prohibiting aggregation would make it more likely for landowners to receive "just compensation" for the harms caused by oppressive regulations.

Moreover, a bright-line rule would provide legal clarity that would protect property owners' reliance interests and promote land-use development. This Court has recognized the benefit of stable property interests. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994) (explaining that, for property rights, "predictability and stability are of prime importance"); *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (same).[2]

2. In fact, this Court has placed so much weight on reliance interests in property rights that the consideration affects the Court's *stare decisis* analysis. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.").

That position is not controversial because the benefits of preserving reliance interests are straightforward. "[M]en will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1212 (1967). Property owners must be given "some assurance that they will have the eventual opportunity to harvest the fruits of their labor." Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 B.Y.U. L. Rev. 949, 959 (2013). Otherwise, "landowners would be hesitant to invest in real property out of fear that their investment could be rendered worthless at the whim[s] of [the government]." *Id.* To that end, "[w]ell-defined and stable property-rights regimes ... reduce legal uncertainty, encouraging more optimal levels of investment [] and development." Troy A. Rule, *Property Rights and Modern Energy*, 20 Geo. Mason L. Rev. 803, 813 (2013). In short, promoting clear rules that better protect property rights encourages investment, development, and, ultimately, the further accrual of wealth. Richard A. Posner, Economic Analysis of Law 40-42 (8th ed. 2011); Carol M. Rose, *The Shadow of the Cathedral*, 106 Yale L.J. 2175, 2187 (1997) ("The usual roles of property rules—defining rights and identifying rights-holders— ... encourage individual investment, planning, and effort because actors have a clearer sense of what they are getting").

"Given the efficiency and fairness benefits of consistent property arrangements, it is hardly surprising that clarity and stability have long been key aims of property law" itself. Rule, *supra*, at 813. States and localities have implemented a number of "doctrines designed to protect landowners who have reasonably relied on an existing scheme of land use regulations against an adverse change in that regulatory change." Stahl, *supra*, at 957; *see also id.* ("[O]ne persistent theme in land use law is the desire to vindicate the expectations of those who have taken substantial actions to their detriment in reasonable reliance on the status quo."). The "vested rights doctrine determines whether a government can enforce a new zoning ordinance against a landowner that began to develop the land under the previous zoning regulation." 4 Am. Law Zoning § 32:2 (5th ed.). Relatedly, "zoning estoppel" protects a property owner who has "made substantial investments in the property[] in good faith reliance on some municipal action or official conduct purporting to authorize the use." *Id.* § 12:9. And "nonconforming use" rules allow a landowner to continue using land in a manner consistent with prior zoning regulations when those regulations are changed. 2 Am. Law Zoning § 14:7 (5th ed.).

"Indeed, it has long been public policy at the national level to induce Americans to incur massive amounts of debt to purchase homes by providing them with the assurance that their investment would be protected." Stahl, *supra*, at 964-65. One of the "principle tools" used to accomplish that predictability in the 20th century was establishing consistent zoning rules. *Id.* at 965. Those rules provided "'greater safety and security in investment' by stabilizing property values against unpredictable change." *Id.*

(quoting Peter Hall, Cities of Tomorrow 317-18 (3d ed. 2002)). A bright-line rule against aggregation would do the same. If potential landowners know that property boundaries are set and will not be shifted later under *Penn Central*, then they will be more likely to invest in and develop property. This is particularly important in cities like New Orleans, which have many vacant lots without viable purchasers other than the owners of adjacent properties. *See* Kelsey Davis, *NORA Relaunches Lot Next Door Program on Monday*, WDSU News (Jan. 25, 2016), http://goo.gl/BWffSh (explaining New Orleans's "lot next door" program, which provides incentives to buy adjacent empty lots). Homeowners will be less likely to purchase vacant lots adjacent to their own property if they are put at a disadvantage relative to others for doing so.

There is some concern that a bright-line standard would empower landowners to dictate their own fate under new regulations. *See Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting); Coletta, *supra*, at 82. That is, if the "parcel as a whole" is defined by property boundaries, then landowners could simply convey the portion of their property that is affected by a regulation and artificially create a regulatory taking. For example, if a regulation bans any development on a three-acre portion of a nine-acre property, then the landowner could sever and sell the three-acre portion to a third party. That third party could then file a regulatory takings claim against the locality because the three acres are worthless as a result of the regulation.

This hypothetical scenario is easily avoided by adding a temporal limitation to the analysis. The Court could define the "parcel as a whole" as the property boundaries

that existed prior to the relevant regulation's effective date. In such a situation, "if the landowner subsequently subdivides the parcel, the original whole will still provide the denominator of the takings calculation." Coletta, *supra*, at 82. Alternatively, the Court could fashion a narrow exception permitting states to defeat a takings claim by showing that the landowner subdivided the property intentionally to create an artificial taking under *Penn Central*. Under either limitation, the perceived opening for abuse quickly closes without introducing the uncertainty that currently plagues the *Penn Central* analysis itself.

C. Permitting the Combination of Adjacent Parcels Would Exacerbate *Penn Central*'s Problems.

Any rule that permits courts to combine parcels would amplify *Penn Central* shortcomings. Pet. Br. 24-28. First, a survey of the lower courts' fact-driven "parcel as a whole" cases demonstrates that such tests further obscure the *Penn Central* analysis. For example, the Federal Circuit "has taken a 'flexible approach, designed to account for factual nuances,' in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity." *Lost Tree*, 707 F.3d at 1293. The "critical issue" in that analysis is "the economic expectations of the claimant with regard to the property," *i.e.*, whether the property owner "treats several legally distinct parcels as a single economic unit." *Id.*

By way of comparison, Michigan applies a different, but no less amorphous, test. There, the size of the parcel as a whole is an inherently "factual inquiry" and involves

consideration of factors like the "degree of contiguity," "the dates of acquisition," and "the extent to which the parcel has been treated as a single unit," but it also allows that "many other[] [factors] enter the calculus." *K & K Const., Inc. v. Dep't of Nat. Res.*, 575 N.W.2d 531, 536 (Mich. 1998). In addition to these considerations, Michigan courts also examine whether it is "realistic" and "fair" to consider only one parcel for purposes of the takings analysis. *Id.*

The Pennsylvania Supreme Court also uses a "flexible approach, designed to account for factual nuances" and considers a "variety of factors" without making one factor "more important than any other." *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002). "These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development." *Id* at 768-69.

The lower courts' tests all differ in one way or another,[3] but they share one aspect in common: each is as complicated as the *Penn Central* analysis itself. *See Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 617 (S.C. 2013) (referring to the "parcel as a

3. Other courts apply similarly nebulous tests. *See, e.g., Intown*, 198 F.3d at 880; *Am. Savs. & Loan Ass'n v. Cnty. of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002).

whole" analysis as a "Gordian Knot"); Merriam, *supra*, at 415 ("The world of the relevant parcel is indeed a wonderland."). These courts must engage in a complicated two-step. First, they apply a multi-factor test to identify the relevant "parcel as a whole" and, second, they move on to the *Penn Central* analysis itself. In essence, before litigants can even discuss the economic impact within the context of *Penn Central*, they must litigate "these fact-specific inquiries [that] have created confusion and inconsistent results in regulatory takings jurisprudence." Powell, *supra*, at 154. If the Court approves a test like these, it would lead to similar parcels across the country being treated as one piece of property in some instances and separate properties in others, with little rhyme or reason. This would make an already uncertain legal regime even more difficult to navigate.

Those jurisdictions that apply a presumption against aggregation are preferable, although they still fall short. For example, Massachusetts finds that "contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel." *Giovanella v. Conserv. Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006). This presumption does streamline the analysis some. But with every presumption comes factors that may overcome it. In Massachusetts, the "definition of the relevant parcel is a fact sensitive inquiry" even with the presumption because the court still looks to a plethora of additional factors. The presumption can be overcome by factors such as "whether the property is divided by a road," "whether property was acquired at the same time," "whether the purchase and financing of parcels were linked," "the timing of development," "whether the land is put to the same or different uses," "whether the

owner intended to or actually did use the property as one economic unit," and the "treatment of the property under State law." *Id.* at 728-29. Petitioner's proposed presumption likewise leaves open the possibility "for landowners or governments to argue, in the particular case, that the facts and circumstances warrant some degree of segmentation and aggregation." Pet. Br. 25. These rules, while an improvement on others, also make an "already difficult and uncertain rule" more opaque. *Apfel*, 524 U.S. at 542 (Kennedy, J., concurring).

Moreover, simply allowing courts to combine parcels under *any* test makes it less likely that the landowner will prevail on a takings claim. *See, supra*, at 14-15.[4] One need look no further than this case to see the damage aggregation causes, as the Murrs lost a substantial sum because Wisconsin was able to aggregate Lot E with Lot F. Lot E would be worth $410,000 without the regulation prohibiting the Murrs from building on or selling it. JA 113. But those prohibitions reduced Lot E's value to a tenth of that amount. JA 114. Wisconsin managed to avoid compensating the Murrs for that loss because combining Lot E with Lot F mitigated the ban's impact. Instead of decimating almost all value of a piece of property (Lot E), the prohibition merely diminished the value of the aggregated "parcel as a whole" (Lot E + Lot F). Pet. App. C-9. That diminution in value was inadequate to establish a regulatory taking.

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4. For this reason, even those states that permit aggregation with relatively straightforward analyses, such as Wisconsin, *see* Pet. App. at A-11 ¶ 20, exacerbate *Penn Central*'s failings.

Other cases across the country show that landowners suffer big losses when their properties are aggregated. For example, in *Forest Properties, Inc. v. United States*, the Federal Circuit's parcel-aggregation led to staggering uncompensated losses. 39 Fed. Cl. 56 (1997). There, the landowner obtained 9.4 acres of "lake bottom" land. *Id.* at 72. The Army Corp of Engineers later prohibited the landowner from developing that land, *id.* at 64-66, and in response the landowner asserted that the prohibition amounted to a regulatory taking and a $2.36 million loss. *Id.* at 67, 79. The court disagreed, holding that the "parcel as a whole" was not just the affected 9.4 acres but also 53 adjacent acres under common ownership. *Id.* at 73. Though the court agreed that the prohibition caused a multi-million-dollar loss, the prohibition did not amount to a taking because there was still substantial value in the remaining 53 acres. *Id.* at 80. In other words, aggregating the 9.4 acres with an additional 53 acres permitted the government to effect an astounding categorical taking simply because the adjacent land shared an owner.

These losses are particularly troubling because they can be described only as arbitrary. When courts use common ownership as a basis for defining separate parcels as one, they burden those who invest in contiguous properties and not those who buy nonadjacent property. Keith Woffinden, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 B.Y.U. L. Rev. 623, 640 (2008) ("The contiguous, commonly-owned property approach is also subject to criticism because it can produce arbitrary and unfair results."). This makes *Penn Central*'s ad hoc analysis all the more capricious.

To that end, combining adjacent parcels because of shared ownership resembles "reverse spot zoning," which the Court criticized in *Penn Central* itself. Reverse spot zoning "severely restricts a small parcel of land that is surrounded by lands not similarly restricted." 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 11:20 (4th ed. 2001). Wisconsin accomplished that same feat by combining Lot E and Lot F. While the Murrs face a categorical restriction, there are no analogous restrictions on similar lots nearby. This "arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones," *Penn Central*, 438 U.S. at 132, which is "discriminatory zoning" that is "the antithesis of land-use control." *Id.*

Further, the various tests for combining parcels destabilize property owners' reliance interests. As already explained, "the industrious and rational need to know that the consequences of their dealings are fixed, at least legally; no shifts of responsibility after the fact." Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 592 (1988). That "means that the legal consequences of rules ought to be clear in advance, in other words, crystals rather than mud." *Id.* Allowing aggregation on an essentially ad hoc basis, *see, supra*, at 19-21, creates instability in property rights and undermines individuals' reliance on the property lines they purchased. "If takings jurisprudence is both ad hoc and ex post, [then] investors may have a very difficult time knowing whether a ... state action will or will not be judged to be a taking." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). At best, aggregation discourages individuals from purchasing and developing lands in close proximity to their own land. A

bright-line rule against aggregation, however, avoids this problem by protecting owners' reliance interests on pre-existing property lines. *Id.* ("Takings law should be predictable ... so that private individuals confidently can commit resources to capital projects.").

CONCLUSION

The Court should reverse the judgment below.

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RECORD AND BRIEFS

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In the
Supreme Court of the United States

JOSEPH P. MURR, *et. al.*,
Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,
Respondents.

On Writ of Certiorari to the Court of Appeals of Wisconsin, District III

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This Court's regulatory takings jurisprudence has been conceptually flawed since the decision in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978), allowed the government to prohibit, by regulation, non-harmful uses of private property if the public benefit to be gained exceeded the purported investment-backed expectations of the property owner. That permitted governments to do the very thing the Takings Clause was designed to prevent, namely, put the entire cost of a public benefit on the back of a single property owner.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), did not remedy that conceptual problem, but merely carved out a small, "deprived of all economic benefit" safe harbor from its operation. As a result, the inquiry into how large a percentage of one's property is effected by a regulation, which should be irrelevant to the question whether a taking has occurred, became even more significant.

The patent injustice at issue in this case exposes *Penn Central*'s conceptual flaw, so the question presented is as follows:

1. Because the lower court's ruling treating two legally-distinct parcels as a "parcel as a whole" exposes the conceptual, anti-property rights flaw in *Penn Central*, should *Penn Central* be overruled or, at the very least, confined to its specific holding rejecting conceptual severance of a single legal parcel when assessing whether a regulatory taking has occurred, rather than extending that holding to require aggregation of neighboring parcels?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea, articulated in the Declaration of Independence and codified in the Takings Clause of the Fifth Amendment, that governments are instituted to protect the inalienable rights of citizens, including the right to acquire and use property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing the Constitution's protection of property rights, including *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012); and *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005).

SUMMARY OF ARGUMENT

Petitioners are correct in their contention that, for purposes of determining whether a regulation has impaired a significant enough percentage of a parcel of

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[1] Pursuant to this Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

real property, *Penn Central* does not require, and implicitly forbids, aggregation of adjoining parcels that happen to come into common ownership.

Moreover, the conceptual flaws in *Penn Central*'s analysis that this case exposes warrant reconsideration of *Penn Central* itself. The Court's rejection of conceptual severance in its regulatory takings analysis has produced a nonsensical differential treatment of parcels of land that are identical but for the provenance of the land's ownership. Even more fundamentally, the Court's focus on the "parcel as a whole" is (or should be) irrelevant to the question whether a taking has occurred at all.

Absent reconsideration and reform of the *Penn Central* balancing test, conduct that the Takings Clause was designed to forbid will continue unabated, with governments at all levels "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

ARGUMENT

I. *Penn Central* Involved Conceptual Severance of a Single Parcel, Not Aggregation of Adjoining Parcels, and Should Not Be Extended to Include Aggregation.

Amicus agrees with Petitioner that in *Penn Central*, this Court addressed only the issue whether, for purposes of the regulatory takings analysis it adopted, a single parcel could be segmented into discreet property interests—what the academic literature has described as "conceptual severance." *See, e.g.*, Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," 88

Colum. L. Rev. 1667, 1676 (1988). *Penn Central* did not endorse, but instead implicitly rejected, the distinct issue involved here, namely, whether adjoining parcels that happen to come into a single ownership must be aggregated for purposes of defining the denominator in the *Penn Central* balancing test.

Moreover, as described in Part II below, even that limited holding is conceptually flawed in ways that severely undermine the fundamental right to property protected by the Takings Clause. As a result, the holding should certainly not be extended to cases involving the aggregation of separately-owned parcels of real property. Indeed, because the patent injustice at issue in this case even purports to find solace in *Penn Central*, the holding in *Penn Central* should itself be revisited.

II. *Penn Central*'s Focus on the Parcel as a Whole Was Conceptually Flawed, and the Flaws Have Only Become More Manifest With Subsequent Cases.

A. *Penn Central*'s rejection of conceptual severance yields discriminatory treatment in regulatory takings challenges.

Without citation, this Court in *Penn Central* noted that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. "In deciding whether a particular governmental action has effected a taking," the majority added, "this Court focuses rather both on the character of the action *and on the nature and extent of the interference with rights in the parcel as a whole*." *Id.* at 130-31 (emphasis added).

Dissenting, then-Justice Rehnquist (joined by Chief Justice Burger and Justice Stevens), described the *Penn Central* majority's "rule that a taking occurs only where the property owner is denied all reasonable return on his property" as posing "difficult conceptual and legal problems." 438 U.S. at 150 n.13 (Rehnquist, J., dissenting). Indeed it did. One such problem arises when determining how to "define the particular property unit that should be examined." *Id.* By rejecting the idea of conceptual severance, the *Penn Central* holding produces the oddity that identical properties, subject to the same regulatory imposition, are treated differently in Takings Clause challenges merely because of the historical pedigree of the properties' titles.

By way of example, suppose there were two 5-acre parcels of land adjoining the main north-south boulevard in City X, each extending 400 feet east from the boulevard. The owner of the first parcel, Owner A, subdivides his parcel east to west into two, 2.5-acre lots, and sells the west lot fronting the boulevard to Owner B, keeping the east lot for himself. The owner of the second five-acre parcel, Owner C, keeps his five-acre parcel intact. City X thereafter decides, for aesthetic reasons, to create a swath of open space along the boulevard by prohibiting all development within 200 feet of the boulevard. Owners B and C both lose development rights on 2.5 acres of land, and both file inverse condemnation actions. But under the *Penn Central* rule, only owner B will likely succeed with his claim, because the regulation has interfered with his property rights in 100% of his "parcel as a whole." The extent of interference with Owner C's property rights, on the other hand, is only 50% (even though it is the identical 2.5-acre restriction), and therefore likely not

a substantial enough interference with his "parcel as a whole" to qualify as a taking. Such a disparity is nonsensical.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), did not remedy that conceptual problem, but merely carved out from its operation the small, "denie[d] all economically beneficial or productive use of the land" safe harbor that the above hypothetical illustrates, treating it as a categorical taking akin to a physical occupation. *Id.* at 1015. And even that safe harbor was relegated to little more than anomaly by this Court's subsequent decision in *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), which, in adding a temporal component to the "parcel as a whole" equation, ensured that almost no regulatory interference with property rights would be treated as a categorical taking. *See id.* at 324 n.18 (describing *Lucas* has having "carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use"); *see also, e.g.*, Andrew S. Gold, "The Diminishing Equivalence Between Regulatory Takings and Physical Takings," 107 Dick. L. Rev. 571, 576-77 (2003) (describing the result in *Tahoe-Sierra* as "indicat[ing] that the *Lucas* per se taking rule will almost never be directly on point in regulatory takings cases"); *cf.* Richard A. Epstein, "The Seven Deadly Sins of Takings Law: The Dissents in *Lucas v. South Carolina Coastal Council*, 26 Loy. L.A. L. Rev. 955, 955 (1993) (describing the *Lucas* holding as applying only "to the tiny, and soon to be extinct, class of total regulatory takings"),

B. The percentage of a parcel affected by a regulation is (or should be) irrelevant to the question of whether the regulation constitutes a taking.

The other conceptual problem with *Penn Central* is even worse. In truth, the percentage of one's property that is necessary for a regulation to qualify as a taking—whether it be all of the property's economic use (*Lucas*) or the owner's significant, investment-backed expectations (*Penn Central*)—should be immaterial to the takings analysis. As Professor Richard Epstein has correctly noted, "the ratio between retained and taken property, is irrelevant" to whether a taking has even occurred or to the amount of compensation that must paid for a regulatory taking. Richard A. Epstein, "*Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations," 45 Stan. L. Rev. 1369, 1376 (1993).

A regulation that affects even the entire property is not a taking if it prevents nuisance, because no one has a right to use his property in ways that cause harm to another's lawful rights. *Sic utere tuo ut alienum non laedas*. William Blackstone, 1 Commentaries § 306; *see also Camfield v. United States*, 167 U.S. 518, 522 (1897) ("His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance"); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"); Steven J. Eagle, "The Four-Factor *Penn Central* Regulatory Takings Test," 118 Penn St.

L. Rev. 601, 617 (2014) ("Because landowners do not have a property right in maintaining a nuisance or other condition inimical to the public health, safety, or welfare, even a large loss resulting from termination of such activity is not compensable").

Conversely, a regulation that affects even a small portion of the parcel *is (or should be) a taking* if it restricts non-nuisance private use in order to derive a benefit for the public. As this Court has long recognized, the Fifth Amendment "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change").

In fact, treating benefit-grabbing regulations that fall short of a complete deprivation as subject only to the *Penn Central* balancing test turns the Takings Clause on its head. That test balances the property owner's investment-backed expectations against the public purpose to be served by the regulation, and holds that no taking occurs (and hence no compensation is due) whenever the regulation serves "a substantial public purpose." *Penn Central*, 438 U.S. at 127. The Takings Clause, which was designed to prevent the majority from benefiting itself at the expense of individual property owners, requires just the opposite result. Indeed, the greater the benefit to the public, the greater the temptation of a government responsive to majority rule to avoid the costs by "forcing

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see also* Richard Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," 8 The Journal of Legal Studies 49, 63 (Jan. 1979) (describing the "problem of tyranny by the majority" in the Takings context).

III. Neither the Nuisance Cases Nor the "Average Reciprocity of Advantage" Cases Exempt the Government from Paying Just Compensation to the Murrs.

Eliminating the conceptually-flawed *Penn Central* balancing test would not mean that compensation must be paid to every property owner whose property suffers a diminution in value as the result of some government regulation. As noted above, regulations designed to prevent nuisance would not, in most circumstances, qualify as a taking at all.[2]

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[2] A likely exception would be regulations aimed at preventing nuisance-like harms that operate against some properties but not other properties that produce the identical harms. The property at issue in *Tahoe-Sierra* is a good example. The argument there was that a development moratorium was necessary to prevent the increase in impervious coverage of land in the Lake Tahoe basin that was causing harmful runoff into the lake and threating its pristine beauty. But the landowner plaintiffs in the case sought to do nothing more with their property than other property owners had already done, namely, build vacation homes. The "nuisance" to the Lake was therefore not their's alone, but only the result of the cumulative impact on the lake caused by all development in the basin. A development ban that operated only against them (rather than one that limited the amount of impervious development on all land in the basin to the scientifically sustainable level, even to the point of requiring *un-development*) must therefore be viewed as grabbing a benefit (in the form of excess development) for the majority of the property

That was the significance of at least two of the three cases on which the majority in *Penn Central* relied (albeit contrary to the majority's characterization of those cases). There was no "taking" in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), because the regulation at issue in that case prohibited a brickyard from operating in a residential area where the dust from its operations caused a nuisance. Nor was there a taking in *Miller v. Schoene*, 276 U.S. 272 (1928), which involved a Virginia statute requiring the destruction of cedar trees that were infected with a communicable plant disease known as cedar rust and therefore "declared to be a public nuisance." *Id.* at 277.[3]

Nor would eliminating *Penn Central*'s balancing test undermine the "average reciprocity of advantage" exception to regulatory takings. *See, e.g., Pennsylvania Coal*, 260 U.S. at 415. On the contrary, eliminating the *Penn Central* balancing test would restore the "average reciprocity of advantage" exception to its

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owners in the basin at the expense of those few effected by the ban.

[3] The third case, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), which involved a prohibition on sand and gravel excavation below the water table line, can also be viewed as preventing a nuisance rather than grabbing a public benefit, even if, as the Court claimed, it was "arguably not a common-law nuisance." *Id.* at 593. That was how the dissent viewed the case, *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting), and by referencing the statement in *Mugler* that "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit," *Goldblatt*, 369 U.S. at 593 (quoting *Mugler*, 123 U.S. at 668-69), the majority arguably did as well.

original purpose and reconcile it with the original purpose of the Takings Clause itself. As this Court noted in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893), the average reciprocity of advantage "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

But neither the nuisance exception nor the average reciprocity exception apply to St. Croix County's restriction of development on the Murrs' property. No one has asserted that the Murrs would be causing a nuisance should they develop their parcel in the same manner as nearly all other parcels in the vicinity have been developed.[4] And the peculiar way in which the grandfather provision of the regulation at issue excludes the Murrs from its benefits eliminates the County's ability to rely on the average reciprocity of advantage doctrine. Quite simply, there is no "reciprocity" for the Murrs, but great advantage for everyone else. If the rest of the owners in the neighborhood have a "strong public desire to improve the public condition" of the area by keeping the Murrs' property vacant, they cannot "achiev[e] the desire by a shorter cut

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[4] And even if development of the Murrs' parcel could be viewed as a nuisance because, when added to the development that has already occurred in the area, the cumulative effect might be harmful—something that has not been asserted by the government—the discriminatory treatment of the Murr's parcel vis-à-vis other parcels in the vicinity should still give rise to a regulatory taking, for the reasons described in note 2, *supra*.

than the constitutional way of paying for" it. *Pennsylvania Coal*, 260 U.S. at 416.

CONCLUSION

The decision of the Wisconsin Supreme Court rejecting the Murrs' regulatory takings claim based on an expansion of the conceptually-flawed holding in *Penn Central* should be reversed, and *Penn Central* should itself be revisited in order to restore the full measure of protection of private property rights intended by the Takings Clause.

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In The
Supreme Court of the United States

JOSEPH P. MURR ET AL.,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of Wisconsin, District III

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS JOSEPH P. MURR ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases implicating issues of vital concern to the nation's business community. This case is of significant interest to the Chamber because it calls on this Court to address the extent to which the United States Constitution safeguards private property rights against intrusive government regulations.

The Fifth Amendment provides that private property shall not be taken without just compensation, and "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" for which the government owes compensation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-15 (1922). But lower courts today are muddled over how to address such regulatory takings. The appellate court below found no compensable taking of

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[1] This brief was authored by *amicus curiae* and its counsel, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided blanket written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

one parcel of land here for the arbitrary and ad hoc reason that petitioners also owned the adjoining parcel of land.

This case is important to property owners, including the Chamber's members, who have an interest in ensuring that the Fifth Amendment's Takings Clause continues to safeguard traditional forms of property ownership in the United States.

SUMMARY OF ARGUMENT

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978), this Court declined "to develop any 'set formula' for determining" when a governmental regulation amounts to a taking under the Fifth Amendment. Instead, the Court decided that this determination of whether a regulation had gone too far, and thereby stepped over the constitutional line set by the Fifth Amendment, should be made via "ad hoc, factual inquiries" through a multi-factor balancing test. *Id.* at 124.

For decades since *Penn Central*, this Court has followed a "'polestar'" of ad hoc adjudication for "partial regulatory takings," *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 & n.23 (2002) (citation omitted), "plung[ing]" the Court's takings jurisprudence "into conceptual darkness" in the form of a "mushy balancing test" that throws any number of facts "into the hopper to determine whether any compensation is owed at all," Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On*

Sharp Boundaries and Continuous Distributions, 78 Brook. L. Rev. 589, 596, 608 (2013). The resulting confusion has served to embolden regulators to pursue rights-restricting policies. *See, e.g.*, Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679, 681 (2005).

Among the greatest mysteries fostered by this ad hoc approach is how to define the unit of property against which the *Penn Central* balancing test's factors must be measured. According to *Penn Central*, takings jurisprudence "does not divide a single parcel into discrete segments," and the *Penn Central* balancing test instead focuses on the property owner's "parcel as a whole." 438 U.S. at 130-31. Consequently, because the *Penn Central* factors require courts "to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions" that must be answered in order to apply the balancing test "is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'"—a unit of property this Court called the "'*parcel as a whole.*'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (citations omitted).

But the Court "has provided little guidance as to what constitutes a 'parcel as a whole,'" especially in the context of physical lots of land that can be identified on a map. John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1537 n.7, 1544 (1994) [hereinafter Fee, *Unearthing the Denominator*]. In the absence of meaningful guidance

from this Court, lower courts disagree over how to define the relevant parcel of property, Pet. 17-20—a definition that can often be outcome determinative under the balancing test, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 631 (2014) [hereinafter Eagle, *Takings Test*].

Thus, what constitutes the parcel as a whole has remained a "difficult, persisting question" to this day, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001), with enormous "uncertainty" generated due to "inconsistent pronouncements by the Court" on this issue, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). The Court's failure to provide consistent, meaningful guidance on how to define the "parcel as a whole" has been evident across the full spectrum of property rights—from air rights, *Penn Central*, 438 U.S. at 129-31, to mining rights, *Keystone*, 480 U.S. at 496-99, to personal property, *Andrus v. Allard*, 444 U.S. 51, 54, 64-66 (1979), and to a temporal interest in developing land during a 32-month moratorium on development, *Tahoe-Sierra*, 535 U.S. at 306, 321-32, to name just a few examples. Because of the lack of clear guidance from this Court, the lower courts all too often engage in an overly-complicated and rights-restrictive "balancing" in regulatory takings cases.

This case presents the Court with an opportunity to move toward a less ad hoc definition of the "parcel as a whole." The Court should adopt a clear test defining the relevant parcel of a physical tract as an identifiable segment of land that, but for the challenged regulation, would have at least one

economically viable use when considered independent of the surrounding tracts—an objective standard far different from the arbitrary and discriminatory one employed by the Court of Appeals of Wisconsin in this case. At the very least, the Court should hold that where the same person owns two adjoining tracts of land and treats those tracts as distinct parcels of property, the relevant parcel is the one tract that was taken due to the regulatory scheme rather than both lots—a standard that comports with this Court's historical focus on landowners' understanding of their property rights.

ARGUMENT

I. *PENN CENTRAL*'S MULTI-FACTOR TEST FOR PARTIAL REGULATORY TAKINGS HAS FOSTERED INCONSISTENT TAKINGS JURISPRUDENCE.

"For the Framers of our Constitution, the principles of good government started with the protection of private property—that guardian of all other rights." Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the* Lake Tahoe *Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2001-2002) [hereinafter Epstein, *Ebbs and Flows*]. Among these protections, the Fifth Amendment's Takings Clause guarantees "that private property shall not be taken for a public use without just compensation," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), thereby guarding against the "natural tendency of human nature" to seize more and more private property through the

exercise of the government's "police power," *Pa. Coal Co.*, 260 U.S. at 415. The Takings Clause has therefore served as one of the foundations for our nation's political stability. Epstein, *Ebbs and Flows*, *supra*, at 5.

For much of its initial history, there was relatively little debate about the meaning of the Takings Clause. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1009 (2003) [hereinafter Fee, *Comparative Right*]. This changed with the rise of modern government, *id.*, as governmental regulation sharply increased in the late nineteenth century and in the twentieth century, Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 Baylor L. Rev. 1, 9-14 (2014).

Confronted with this flood of ever-growing regulatory laws, this Court warned that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," and thus explained that "if regulation goes too far it will be recognized as a taking" under the Fifth Amendment. *Pa. Coal Co.*, 260 U.S. at 415-16. Ever since, this Court has struggled with "how to discern how far is 'too far.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

In *Penn Central*, the Court stated that it was "unable to develop any 'set formula' for determining" when a regulation amounts to a taking under the Fifth Amendment, and insisted that this determination must be made through "essentially ad hoc, factual inquiries"

that would depend largely on the circumstances of each case. 438 U.S. at 124. In doing so, *Penn Central* explained that these fact-based inquiries were to be guided by "several factors," namely (1) "[t]he economic impact of the regulation," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.*

"The Court gave no clue as to the meaning of the language used in the formulation of these factors, what sort of evidence would tend to prove their existence, what weight to assign to each of them, and how they translate into a proper inverse condemnation cause of action that, if proved, would entitle the aggrieved plaintiff to relief as a matter of law." Kanner, *supra*, at 690.

Since *Penn Central*, this Court has adopted categorical formulas that deem regulatory actions to be "*per se* takings for Fifth Amendment purposes" where the "government requires an owner to suffer a permanent physical invasion of her property" and where regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (citation omitted). Outside those contexts, however, this Court continues to insist that "regulatory takings challenges are [to be] governed" by *Penn Central*'s multi-factor test. *Id.*

Penn Central's "indeterminate, inclusive balancing test" provides a "chaotic foundation" for takings jurisprudence. Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 576 (2009). "Under *Penn Central*'s vague, multi-

factor approach one cannot reliably tell what 'the law' is, and how it applies to the controversy at hand without first taking years to let judges have a go at it on an ad hoc basis in each of the many factual variants of regulatory impositions on rights of private property ownership." Kanner, *supra*, at 691. Thus, as the late U.S. Circuit Judge James Oakes explained, *Penn Central* "permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments as to the relative worth of the legislation as opposed to the importance or dollar value of the property rights at stake." James L. Oakes, *'Property Rights' in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 613 (1981).

As a result, the *Penn Central* test has generated a "regulatory takings jurisprudence" that "has long been infamous for its incoherence." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. Rev. 899, 899 (2007) [hereinafter Eagle, *Property Tests*]. "Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

Commentators have therefore repeatedly pointed out that takings jurisprudence under *Penn Central* is "little more than muddled and incoherent, if not incomprehensible, rhetoric." Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Cir. B.J. 677, 678 (2013); *accord, e.g.*, Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 Ala. C.R.

& C.L. L. Rev. 25, 27-28 (2013); Eagle, *Takings Test*, *supra*, at 632; Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993); Fee, *Comparative Right*, *supra*, at 1006; Fenster, *supra*, at 576; R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 732 (2011).

As one commentator has observed, "[w]e properly think of law as a set of coherent rules that govern the conduct of people and institutions, that lawyers can explain to clients, and that enable citizens to ascertain which of their expectations are enforceable, and which courses of action on their part are legal *vel non*," and therefore *Penn Central*'s "overtly ad hoc decision-making regime is antithetical to a rule of law." Kanner, *supra*, at 724-25. "[T]o say that 'the law' is unknowable without first engaging in a lengthy and costly multi-year litigation process that leads to ad hoc results arrived at *after the court of last resort first makes 'factual inquiries' years after the trial has been completed*, is to say that there is no law worthy of the name." *Id.* at 725.

That this ad hoc approach has yielded inconsistent and unpredictable results, particularly among the lower courts, has not gone unnoticed by many Justices of this Court. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 540-41 (1998) (Kennedy, J., concurring & dissenting) (with respect to "the regulatory takings concept," "it is fair to say it has proved difficult to explain in theory and to implement in practice," and "[c]ases attempting to decide when a regulation becomes a taking" under *Penn Central*'s test

"are among the most litigated and perplexing in current law"); *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting) (acknowledging the "great uncertainty" generated by "this Court's takings jurisprudence"); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 n.17 (1985) (Blackmun, J.) (acknowledging that "[t]he attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking'" under this Court's jurisprudence "has been called the 'lawyer's equivalent of the physicist's hunt for the quark'" (citation omitted)).

In short, "regulatory takings law is in disarray" today. Pomeroy, *supra*, at 678. Due to the "vagueness and unpredictability" of *Penn Central*'s factors, takings law "has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large." Kanner, *supra*, at 681 (footnote omitted); *see also* Radford & Wake, *supra*, at 732.

Given "the absence of discernable rules" in *Penn Central*, lawyers advising both regulators and landowners "are unable to ascertain which facts of the controversy will prove to be the operative, much less decisive, [considerations] nor the prospective likelihood of litigational success or failure." Kanner, *supra*, at 692; *accord* Radford & Wake, *supra*, at 736. This has "encouraged regulators to pursue policies that have sharply reduced the supply of housing and are implicated in the ongoing, mind-boggling escalation in home prices," Kanner, *supra*, at 681, to name just one economic consequence of the ongoing confusion.

Moreover, *Penn Central*'s "fuzzy" multi-factor test "encourages litigation," generating a "climate of uncertainty" that too often prompts the government to "resist even meritorious claims, playing the odds and counting on the courts' propensity to rule in their favor for sometimes unarticulated, ideological, or fiscal reasons." *Id.* at 682, 692.

As explained below, the Chamber urges the Court to resist the temptation to define the relevant parcel here in the same ad hoc fashion that it treats the *Penn Central* factors themselves. Instead, the Court should adopt a clear definition of the relevant parcel for the category of cases in which property owners maintain that regulations took a tract of land.

II. IN THE ABSENCE OF MEANINGFUL GUIDANCE FROM THIS COURT ABOUT HOW TO DEFINE THE PARCEL AS A WHOLE, LOWER COURTS HAVE OFTEN UTILIZED AD HOC FACTUAL CONSIDERATIONS TO INCONSISTENTLY DEFINE THE RELEVANT PARCEL.

Since *Penn Central* never explained precisely what its multiple factors meant or how they were supposed to guide the ad hoc factual inquiries that *Penn Central* called for, this Court, lower courts, and litigants have struggled to impart meaningful substance to *Penn Central*'s balancing test. *See* Kanner, *supra*, at 681-82, 690. Among the most confounding and important questions fostered by *Penn Central*'s test is how to define the so-called "parcel as a whole."

In *Penn Central*, the property owners argued that a regulatory law went too far, and therefore amounted to a taking under the Fifth Amendment, because it restricted their "air rights" above their property. 438 U.S. at 128-30. In effect, the owners argued that they could "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development," an argument this Court deemed "untenable." *Id.* at 130. According to *Penn Central*, "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* Instead, the *Penn Central* factors focus on an owner's "rights in the parcel as a whole." *Id.* at 130-31.

As the dissent prophesied in *Penn Central*, the definition of the relevant parcel has since become the linchpin to the *Penn Central* multi-factor test. *See id.* at 149 n.13 (Rehnquist, J., dissenting) (explaining that courts would need to "define the particular property unit that should be examined"); *see also Keystone*, 480 U.S. at 514-15 (Rehnquist, C.J., dissenting) ("The need to consider the effect of regulation on some identifiable segment of property [under *Penn Central*] makes all important the admittedly difficult task of defining the relevant parcel."); Epstein, *Ebbs and Flows*, *supra*, at 22.

This is so because one of the "critical" threshold questions that must be answered before applying the *Penn Central* factors is "how to define the unit of property" against which the factors are meant to be measured. *Keystone*, 480 U.S. at 497; *accord, e.g.*,

Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 725, 857 N.E.2d 451, 456 (2006); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 305, 737 S.E.2d 601, 614 (2013).

Much as *Penn Central* declined to explain the meaning of its factors, *Penn Central* likewise did not decide "how to determine the relevant parcel of land" against which its factors were to be measured. Fee, *Unearthing the Denominator*, *supra*, at 1535-36. And in the decades since, the Court "has provided only minimal guidance" on this issue, "[r]epeated[ly] admoni[shing] [lower courts] to use the 'parcel as a whole'" while "do[ing] little to define the contours of that whole parcel in any particular case." *Giovanella*, 447 Mass. at 726, 857 N.E.2d at 456. As a result, the vital question of what constitutes the parcel as a whole has remained a "difficult, persisting question" to this day, *Palazzolo*, 533 U.S. at 631, in no small measure because "the rhetorical force" of this Court's prior precedent has been far "greater than its precision" on this issue, with the resulting "uncertainty" producing "inconsistent pronouncements by the Court," *Lucas*, 505 U.S. at 1016 n.7. Indeed, the problem of defining the relevant parcel has become a "conceptual black hole." *Dunes W. Golf Club, LLC*, 401 S.C. at 306, 737 S.E.2d at 615 (citation omitted); *accord* Fee, *Comparative Right*, *supra*, at 1032.

Moreover, in the absence of meaningful guidance from this Court on the definition of the relevant parcel, lower courts have "used a variety of fact-specific and often inconsistent methods to define the relevant parcel," especially in cases (like the one here) where property owners have claimed that government

regulations took physical tracts of land. Fee, *Unearthing the Denominator*, *supra*, at 1545-49; *see also* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 Vt. L. Rev. 549, 564 (2012); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 668 (1996). This ad hoc approach to defining the parcel as a whole is unsurprising given that the concept of such a parcel derives from, and is meant to influence, the equally ad hoc, fact-specific *Penn Central* factors. *See* Eagle, *Takings Test*, *supra*, at 632.

The Court now has an opportunity to define the "'parcel as a whole' concept" in the commonly-recurring context raised by this case, Pet. i, and to thereby finally settle the "persisting question of what is the proper denominator in the takings fraction," *Palazzolo*, 533 U.S. at 631, in the setting of physical tracts of land where the question arises most often and spawns the greatest division among lower courts.

III. THE RELEVANT PARCEL SHOULD BE DEFINED BY AN OBJECTIVE ASSESSMENT OF WHETHER THE TRACT OF LAND HAS INDEPENDENT ECONOMIC VIABILITY.

The Court should adopt an objective, clear definition for what constitutes the relevant parcel where, as here, property owners are subject to a partial regulatory taking of a physical tract of land. Such a categorical approach is rooted in the historical safeguards for these traditional property rights that were recorded as part of the constitutional protection afforded by the Fifth Amendment. *See Lucas*, 505 U.S.

at 1016 n.7, 1027-28. A categorical approach also finds support in recent decisions from this Court that have embraced less ad hoc tests to decide challenges to regulations that infringe on physical tracts of land. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *Lucas*, 505 U.S. 1014-19, 1027-32; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-36 (1982); *see also Tahoe-Sierra*, 535 U.S. at 330-32 (fee simple estate is a real property interest defined by objective geographic considerations). An objective definition for the relevant parcel where the parcel in question consists of a fee simple estate in land would better ensure that traditional property rights in physical tracts of land continue to receive the protection they have long enjoyed under the law.

A. The "common ownership" test to determine the relevant parcel, as adopted by the Wisconsin Court of Appeals, results in the arbitrary and unpredictable extinction of property rights.

The ordinance in question here prevents petitioners from selling or developing a physical lot of land. *See* Pet. App. B-9. That constitutes a takings challenge to a regulation that governs the fee simple estate in land. *See Tahoe-Sierra*, 535 U.S. at 331-32 ("a permanent deprivation of the owner's use of the entire area [of a fee simple estate] is a taking of 'the parcel as a whole,' whereas a temporary restriction" on development during a particular time period is not the whole parcel); *Palazzolo*, 533 U.S. at 627-28 (stripping successive landowner's right to transfer his interest in a physical tract of land purchased by a prior owner "would work a critical alteration to the nature of

property" since the "right to transfer [an] interest in land is a defining characteristic of the fee simple estate" (citation omitted)). The "fee simple interest" in a physical "tract" of land "is an estate with a rich tradition of protection at common law"—one that American property owners have long been familiar with and the protection of which was part of the "historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 505 U.S. at 1016 n.7, 1027-28.

In defining the relevant parcel and deciding whether the ordinance at issue amounted to a regulatory taking, the Court of Appeals of Wisconsin, conducting the "ad hoc factual, traditional takings inquiry" called for by a "partial taking[s]" analysis, concluded that the relevant parcel in this case consisted of both Lots E and F and that no partial taking occurred. Pet. App. A-9 to A-11, A-14 to A-18. The court arrived at this conclusion by focusing on what it considered to be a key fact: petitioners' common ownership of these two adjacent lots. *Id.* Other courts, in similar circumstances, have reached different results by looking to equally ad hoc factual considerations. Pet. 17-20 (collecting a sample of lower courts' inconsistent approaches to defining the relevant parcel in cases where tracts of land are at issue); *see also* John E. Fee, *Of Parcels and Property, in* Taking Sides on Takings Issues 101, 110-16 (Thomas E. Roberts, ed., 2000) [hereinafter Fee, *Of Parcels and Property*]; Lisker, *supra*, at 667-68, 706-19; Fee, *Unearthing the Denominator*, *supra*, at 1545-57.

Defining the relevant parcel based on common ownership of contiguous tracts of land, as the Court of

Appeals did here, "does little to serve the policies underlying the Takings Clause" because, "[a]s a standard of just compensation, it is simply illogical." Fee, *Of Parcels and Property*, *supra*, at 112. Simply put, this common ownership criterion "results in arbitrary treatment of landowners and harmful distortions of real estate markets." *Id.*

As one commentator posits by way of example to demonstrate the common ownership criterion's arbitrary nature, "suppose that five individuals each own equally sized beachfront lots. In addition, they each own private homes. But whereas the first four owners live across town, the fifth has her home on a lot directly behind her beach lot." Fee, *Unearthing the Denominator*, *supra*, at 1552. "If a regulation were enacted restricting all viable use of the beachfront property, the first four would be compensated while the fifth might not," since the first four do not commonly own two adjacent lots of land whereas the fifth owner does. *Id.* "Focusing on contiguous common ownership therefore makes takings cases turn upon the randomness of whether real estate interests are contiguous, or instead on the cleverness of landowners in keeping real estate interests sufficiently fragmented." Fee, *Of Parcels and Property*, *supra*, at 113; *see also* Fee, *Comparative Right*, *supra*, at 1032 ("[T]he quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part.").

This example is not merely an academic hypothetical. It is what happened in this lawsuit and what occurs all too often in takings cases involving tracts of land. For decades, Lots E and F were not

under common ownership. Pet. Br. 3-4. But, in the 1990s, both lots were transferred to petitioners, resulting in petitioners becoming the common owners of these two contiguous lots. Pet. Br. 4. Under the Court of Appeals' common ownership rationale here, the two lots were distinct parcels of property for decades but the mere happenstance of their having been transferred to common owners in the 1990s transformed the two lots overnight into a single, merged parcel. *See* Pet. App. A-17. Property rights should not evaporate on such an arbitrary whim.

B. The relevant parcel of land here should be defined based on an objective test that examines the land's independent economic viability.

Rather than countenance the type of arbitrary and discriminatory ad hoc criteria for defining relevant parcels like the common ownership standard invoked by the Court of Appeals here—criteria that are wholly inconsistent with the protection the law has generally afforded to traditional fee simple interests in tracts of land—the definition of the relevant parcel in cases involving physical tracts of land should objectively focus on "the property itself and its relation to the community." Fee, *Of Parcels and Property*, *supra*, at 116; *see also* Eagle, *Property Tests*, *supra*, at 941 ("What is needed is an objective definition of the property right; one that neither favors, nor readily could be manipulated by, either owner or government actor.").

Specifically, "any identifiable segment of land" should be considered the relevant parcel "if prior to

regulation it could have been put to at least one economically viable use," independent of any adjacent tracts. Fee, *Unearthing the Denominator*, *supra*, at 1557.

If the tract of land identified by the property owner meets this standard, it serves as the relevant parcel. *Id.*; *accord* Fee, *Of Parcels and Property*, *supra*, at 117 ("[A] whole parcel is one that is large enough that even if it were the owner's only real property, it would be feasible and profitable to use for some independent enterprise."). "Only by focusing on the land itself, rather than on the paper transactions of owners and government, can disparate treatment of landowners be avoided." Fee, *Of Parcels and Property*, *supra*, at 117.

At a minimum, this Court should make clear that adjoining tracts of land under common ownership are distinct parcels where they have been treated as distinct tracts of land by the property owners, since this approach best conforms to the Court's history of focusing on landowners' understanding of their property rights. *See Lucas*, 505 U.S. at 1027 ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); *see also id.* at 1035 (Kennedy, J., concurring) (Takings Clause "protects private expectations to ensure private investment"); *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) ("[E]ven when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner

develops distinct parcels at different times and treats the parcels as distinct economic units."), *petition for cert. filed* (U.S. Mar. 22, 2016) (No. 15-1192).

CONCLUSION

The judgment of the Court of Appeals of Wisconsin should be reversed.

Respectfully submitted,

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April 15, 2016

RECORD
AND
BRIEF

No. 15-214

In the Supreme Court of the United States

JOSEPH P. MURR, *et al.*,
Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF OF *AMICI CURIAE* WALTER F. MONDALE, ST. CROIX RIVER ASSOCIATION, AND AMERICAN RIVERS IN SUPPORT OF RESPONDENTS

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INTERESTS AND IDENTITY OF THE AMICI[1]

Amici are one individual and two private not-for-profit organizations who embrace and represent the conservation and recreational interests of the St. Croix River ("the river") community. The federal government summarized such interests well when it declared that "the lower St. Croix River and its immediate environment possess outstandingly remarkable scenic and aesthetic, recreational, and geologic values, and that the river and its immediate environment should be protected for the benefit and enjoyment of present and future generations." Bureau of Outdoor Recreation, Dep't of the Interior, Scenic River Study of the Lower St. Croix River 11 (Feb. 1973) [hereinafter Scenic River Study].[2]

Amicus Walter Mondale is a former Vice President of the United States, U.S. Senator from the State of Minnesota, U.S. Ambassador to Japan, and Minnesota Attorney General. After serving as Minnesota Attorney General, he was appointed to fill a Senate vacancy in 1964, and then won reelection in 1966 and 1972. In 1976, Mondale was elected as Vice President of the United States, and served for four years. Mondale was also the Democratic Party's

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

[2] The bifurcation of the St. Croix River into "Upper" and "Lower" in government legislation and publications is an artifact of the designation process. In 1968, the entire St. Croix River except for the lowest fifty-two miles was incorporated into the Wild and Scenic Rivers system. Over the next ten years, that lower section was incorporated as well. *See* Part II, *infra*.

Presidential nominee in 1984. As a U.S. Senator, Mondale was the lead co-sponsor of the 1968 Wild and Scenic Rivers Act ("the Act"), and played an instrumental role in the designation of all sections of the St. Croix River for protection under the Act.

In the Twin Cities and several smaller riverine communities, people live, work, and play on the St. Croix River. *Amicus* St. Croix River Association ("the Association") represents these citizens of Minnesota and Wisconsin. Since the Association's founding in 1911, its underlying principle has remained constant: to "represent the direct interest of people living along the banks" of the river and to "sav[e] the St. Croix for the people." James Taylor Dunn, Saving the River: The Story of the St. Croix River Association, 1911-1986 1 (1986). The Association's more than 800 members are guided by a Board of Directors, as well as an Advisory Council whose members come from local government, local business, and environmental groups. *See, e.g.*, SCRA Advisory Council, St. Croix River Association, www.stcroixriverassociation.org/who-we-are/scra-advisory-council/ (last visited Apr. 5, 2016). Together, they advance the Association's mission: to "protect, restore, and celebrate the St. Croix River." St. Croix River Association, www.stcroixriverassociation.org (last visited Apr. 4, 2016).

Amicus American Rivers, Inc. is a national conservation organization founded in 1973. With over 200,000 members and supporters, American Rivers' mission is to "protect wild rivers, restore damaged rivers, and conserve clean water for people and nature." About Us, American Rivers, www.americanrivers.org/about/ (last visited Apr. 4, 2016). American Rivers has a particular interest in

the effective implementation of the Wild and Scenic Rivers Act. The organization was founded in part to promote the Act and ensure that the Act was being vigorously implemented. *See* Tim Palmer, Endangered Rivers and the Conservation Movement 150 (1986).

The St. Croix River is part of the national Wild and Scenic Rivers system because it possesses "outstandingly remarkable" values ("ORVs"). *See* Wild and Scenic Rivers Act § 1, 16 U.S.C. § 1271; *see also* Scenic River Study, *supra*, at 11 (finding the river to have outstandingly remarkable scenic, recreational, and geologic values). *Amici* share an appreciation for the ORVs of the St. Croix River that have been identified by the federal government. For example, the Association's annual photography contest embraces the river's scenic value, and organized canoe trips, the first of which, in 2011, was seventeen days long, illustrate the river's recreational value. *See* Figures 1-3, *infra;* St. Croix River Association Photo Contest, St. Croix River Association, www.stcroixriverassociation.org/scra-photo-contest/ (last visited Apr. 12, 2016); 2016 Paddle Namekagon, Wild and Scenic Paddles, https://scrapaddle.org (last visited Apr. 12, 2016). Likewise, *amici* and the Act work in tandem to protect the St. Croix. Shoreline development is a threat that both *amici* and federal agencies have identified. *See, e.g.*, Most Endangered Rivers: About This Report. American Rivers. www.americanrivers.org/endangered-rivers/about/ (last visited Apr. 7, 2016) (identifying the St. Croix as one of "America's Top Ten Endangered Rivers" in 2009 and 2011, in part because of the threat of increasing development and loosening zoning restrictions); Scenic River Study, *supra*, at 11 (finding the river

endangered by "[a] shoreline which is rapidly being developed for both residential and commercial uses"). Indeed, the affinity between the Act and *amici* date back to 1965 when the Association lobbied for federal protection of the inclusion of the St. Croix River. *See* Part II, *infra;* Dunn, *supra*, at 38-39. In addition, *amicus* former U.S. Senator Mondale co-sponsored bills in 1965 and 1967 to give federal protection to the St. Croix River, and ultimately supported its inclusion in the incipient Wild and Scenic Rivers Act. *See* Theodore J. Karamanski, Saving the St. Croix: An Administrative History of the Saint Croix National Scenic Riverway 73-90 (1993) (describing history of federal protection). The provenance of *amici* legitimates their role as the voice of the river in this case.

SUMMARY OF ARGUMENT

Petitioners challenge a 1975 zoning ordinance that restricts the development and sale of their substandard shoreline parcels on the St. Croix River. Petitioners erroneously contend that the "parcel as a whole" principle should not apply to their land and seek to have the application of the zoning ordinance held a regulatory taking within the meaning of the Fifth Amendment. *See* U.S. Const. amend. V. *Amici* respectfully submit the following information in support of Respondents, who ask the Court to reject these arguments and to affirm the decision of the Wisconsin Court of Appeals.

Amici believe that the factual context of the St. Croix River and the laws that protect it demonstrate the validity of the challenged regulations. Three facts make this clear. First, the federally-recognized

outstandingly remarkable scenic, recreational, and geologic values of the river, along with its numerous fish and wildlife, are indeed remarkable and deserve protection. Second, the federal designation of the St. Croix River as part of the Wild and Scenic River system arises from a longstanding *local* desire to see the river protected. Third, Congress intended the Act to facilitate and coordinate federal, state, and local action to protect Wild and Scenic Rivers, and local ordinances like the one at issue in this case are vital to the effective implementation of the Act.

ARGUMENT

I. The St. Croix River is Worthy of National Recognition and Protection Because of its Outstandingly Remarkable Scenic, Recreational, and Geologic Values and its Fish and Wildlife.

The St. Croix River flows 165 miles from its source in northeast Wisconsin to its confluence with the Mississippi River. For most of its length, the river forms the boundary between Wisconsin and Minnesota. The river varies in appearance along its length, "from a deep, narrow gorge with basalt cliffs to expansive views of a wide river valley." Wis. Dep't of Natural Res., Minn. Dep't of Natural Res., U.S. Dep't of Interior, Nat'l Park Serv., Cooperative Management Plan of the Lower St. Croix National Scenic Waterway 3 (2002) [hereinafter Cooperative Management Plan]. In its lower stretch, the river slows down and spreads out, forming Lake St. Croix. This is the location of the Murr's cabin, about twelve

river miles from the Mississippi. Elizabeth Ellet, a nineteenth century American author and historian, described Lake St. Croix in a travelogue of a Mississippi River steamboat tour:

> After leaving the Mississippi, we entered through a narrow channel into Lake St. Croix . . . . Bluffs line the [Minnesota] shore on the left hand; on the other [Wisconsin] is a low wall of rocks, gradually rising and receding a little as you advance, till they too become towering heights. The graceful curve of the line of shore, the alternate swelling and sinking of the wooded hills, the deep ravines occasionally opening between them – the dark shadows thrown by the heights on the water, with the narrow line of light near the shore marking the departure of the sun, and now and then a projecting headland further out, a dark and shaggy mass – were so beautiful, that one could not regret the scenery of the Mississippi.

Elizabeth Fries Ellet, Summer Rambles in the West 137 (1853).

Ms. Ellet's appealing description of the St. Croix River foreshadowed a 1972 Department of the Interior study. That study identified the river's scenic, recreational, and geologic values as the basis for its inclusion in the national Wild and Scenic River

program.[3] Scenic River Study, *supra*, at 11-12. The scenery of the St. Croix River defies easy description. The federal Scenic River Study dryly described the river as having "[a] highly scenic course, complemented by an island and slough river environment in the upper reaches and a lake-like river environment in the lower reaches." Scenic River Study, *supra*, at 15. A better sense of the river's scenery comes from Ellet's lyrical prose:

> No more exquisite landscape could be pictured by fancy . . . . The headlands on either side approach near each other, the morning sunshine is golden on their woods; the calm water lies like a sheet of silver between, and the background is a lofty forest-covered bluff. In the foreground is an island covered with tall trees, the only undergrowth being the tall grass, brilliantly green.

Ellet, *supra*, at 140. The popular appreciation for the scenery of the St. Croix also appears in state and federal legislatures. *See* Wis. Stat. § 30.27(1) (2016) ("The preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of Wisconsin."); *see also* Minn. R. 6105.0351 (2016) (protecting the "outstanding scenic, recreational, geologic, fish and wildlife, historic, cultural, and other

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[3] The 1972 study examined only the lower fifty-two miles of the river, known as the Lower St. Croix, which contains the Murrs' cabin. The upper portion of the river was designated a Wild and Scenic river in 1968. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 3(a)(6), 82 Stat. 906, 908 (1968).

similar values of the Lower Saint Croix National Scenic Riverway."); 118 Cong. Rec. 34,391 (1972) (statement of Sen. Mondale) ("The famed Dalles of the St. Croix, spectacular rock formations, and richly varied scenery have justly brought national acclaim to the St. Croix River.").[4]

Figure 1: Canoe on the St. Croix River. Mike Chun, Ready to Go (2015).

Scenery often gives rise to recreation; indeed, the St. Croix's "suitab[ility] for many outdoor recreation pursuits" was a reason for its recommended inclusion in the Wild and Scenic Rivers system. Scenic River Study, *supra*, at 15. In the context of the Act, recreational value is defined as including "sightseeing, wildlife observation, camping, photography, hiking, fishing, hunting and boating." Interagency Wild and Scenic Rivers Coordinating Council, U.S. Forest Serv. & Nat'l Park Serv., The Wild & Scenic River Study Process 13 (Dec. 1999)

[4] The Dalles of the St. Croix is located on the Lower St. Croix.

[hereinafter Study Process]. Visitors to the Lower St. Croix River can enjoy all of these activities. However, high quality and widely enjoyed recreation can motivate an increase in private development to capture higher property values, which, in turn, will destroy the values of the river that attract people to it in the first place.

To allow unchecked private development would prioritize the preferences of shoreline property owners, who constitute a *minority* of river users, to the detriment of the majority of people who recreate on the St. Croix River. The definition of "recreational" in the context of the Act emphasizes attracting visitors "willing to travel long distances to use river resources." Study Process, *supra*, at 13 (discussing "opportunities [that] . . . have the potential to attract[] visitors from outside the region"). More than seventy percent of visitors to the St. Croix National Scenic Riverway are non-local.[5] Nat'l Park Serv., Natural Resource Report NPS/NRSS/EQD/NRR—2015/947, 2014 National Park Visitor Spending Effects: Economic Contributions to Local Communities, States, and the Nation 33 (2014), www.nature.nps.gov/socialscience/docs/VSE2014_Final.pdf (finding also that non-local visitors to the St. Croix spent $24 million and supported 397 jobs in 2014). Many of these visitors participate in

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[5] Non-local visitors are defined as those coming from counties more than 60 miles away from the St. Croix National Scenic Riverway, which includes the entire length of the St. Croix River. Nat'l Park Serv., Natural Resource Report NPS/NRSS/EQD/NRR—2015/947, 2014 National Park Visitor Spending Effects: Economic Contributions to Local Communities, States, and the Nation 3, 14 (2014), www.nature.nps.gov/socialscience/docs/VSE2014_Final.pdf.

recreational activities that require the natural richness of the St. Croix River to remain intact, such as chartered fishing. *See, e.g.*, St. Croix River Fishing Guides, St. Croix River Fishing, www.stcroixriverfishing.com/FishingGuides.html (last visited May 2, 2016) (describing the Lower St. Croix River as being "prime habitat for the largest fish in the river, including sturgeon and flathead catfish").

The threat of development was central to the argument for designating the St. Croix River as part of the Wild and Scenic River system. During debate in Congress, then-Senator and *amicus* Walter Mondale described the river as "probably the last remaining unpolluted, scenic river left in the Nation next to a major metropolitan area" and asked "whether the St. Croix River is going to go the way that all other rivers have gone, from lovely, scenic, magnificent rivers into ugly, desecrated sewage." Designating a Segment of the St. Croix as Part of the Wild and Scenic Rivers System: Hearing on S. 1928 Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, 92d Cong. 4-5 (1971-72) (statement of Sen. Mondale). As this lawsuit demonstrates, development continues to threaten the values of the St. Croix River today.

The development of private shoreline property along the St. Croix River benefits property owners, but can impair the enjoyment of all others. Unrestrained development and its effects generally impair recreation in natural places and would ruin the values that make the St. Croix River a favored location for recreation.[6] *See, e.g.*, Jan G. Laitos &

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[6] For example, the sewage system on the Murrs' property is a cesspool that discharges raw sewage into the St. Croix River. JA 35.

Rachel B. Gamble, The Problem with Wilderness, 32 Harv. Envtl. L. Rev. 503, 523-24 (2008) ("[S]econd-home communities that place people in close proximity to wilderness areas . . . dilute[] the wilderness experience [and] . . . detract from the remoteness people seek in entering wild lands"); William J. Lockhart, External Threats to Our National Parks: An Argument for Substantive Protection, 16 Stan. Envtl. L.J. 3, 40-41 (1997) ("[A]n increasing multitude of development activities external to our parks are impacting and threatening to engulf them, causing increasingly severe damage within the parks to the values and resources which they were set aside to preserve."); Joseph L. Sax, Buying Scenery: Land Acquisitions for the National Park Service, 1980 Duke L.J. 709, 709 (1980) ("[E]ven the most conventional private land uses are frequently incompatible with the historic, archeological, and ecological preservation mandates under which the park system operates"). Based on the purposes of the Act, and the reality that the vast majority of users of the St. Croix do not own property on it, it is entirely consistent with the recreational value of the river to reasonably limit private development.

Figure 2: St. Croix Dalles. Gary Noren (2012).

The values of the St. Croix River also include "[a]n outstanding area of 'geological' interest, notably the Dalles of the St. Croix." Scenic River Study, *supra*, at 15. The geology of the Dalles of the St. Croix River both contributes to the scenic value of the river and to scientific inquiry. The geology often appears in descriptions of the river. *See, e.g.*, 118 Cong. Rec. 34,391 (1972) (statement of Sen. Jackson) ("[T]he famous Dalles of the St. Croix [is] an area of outstanding scenic and geological interest."); Ellet, *supra*, at 143-44 ("The stream enters a wild, narrow gorge, so deep and dark, that the declining sun is quite shut out; perpendicular walls . . . rising from the water, are piled in savage grandeur on either side."). The Dalles of the St. Croix is also an area of scientific interest. Minn. Dep't Natural Res., Geology of Interstate Park: The St. Croix Dalles (2009), http://files.dnr.state.mn.us/destinations/state_parks/interstate/interstate_geology.pdf (The area "contains

more potholes in a smaller area than any other location in the world, and has the world's deepest known potholes as well.").[7] In short, "[a]s a result of land acquisition through the Wild and Scenic River Act and by the Minnesota and Wisconsin state parks, access to the geology of the area is excellent." Mark E. Cavaleri, John H. Mossler, and Gerald F. Webers, *The Geology of the St. Croix Valley in* Field Trip Guidebook for the Upper Mississippi Valley Minnesota, Iowa, and Wisconsin 23, 23 (N.H Balaban, ed. 1987).

The fish and wildlife of the St. Croix River are central to the scenic and recreational values of the river – according to one expert, the river is the least human-impacted natural sanctuary in the Upper Mississippi drainage, home to many uncommon Midwestern species. Mussels of the St. Croix River, U.S. Fish and Wildlife Serv.: Endangered Species, www.fws.gov/midwest/endangered/clams/stcroix.html (last visited Jun. 7, 2016). The ecological richness of the river makes it valuable to researchers. Jane E. Brody, New Research Station Exploring the Ecology of a Pristine River, N.Y. Times, (Aug. 21, 1990). ("'Researchers are starving for an area like this to work in,' Mr. Lawrenz said. 'They are coming here to study even before we've advertised that we are ready for them.'"). The St. Croix River is home to iconic wildlife like bald eagles, wolves, heron, osprey, deer, black bear, beavers, and otters. *Id.*; St. Croix State Park: Park Info, Minn. Dep't of Natural Res., www.dnr.state.mn.us/state_parks/st_croix/narrative.html. The St. Croix is also one of the world's greatest

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[7] In geology, a pothole is a hole in a rock riverbed caused by unusual glacial erosion. *Id.* ("The deepest one that has been measured accurately, the "Bottomless Pit", is just under sixty feet deep and twelve to fifteen feet wide.").

mussel watersheds, with forty-one native species of mussel, including five listed under the Endangered Species Act. *See* Mussels of the St. Croix River, Prof. Dan Hornbach's Lab, www.macalester.edu/~hornbach/stcroix/musseldata.html (last visited Apr. 4, 2016) (identifying the Higgins eye, sheepnose, snuffbox, spectaclecase and winged mapleleaf mussels as endangered inhabitants of the river).

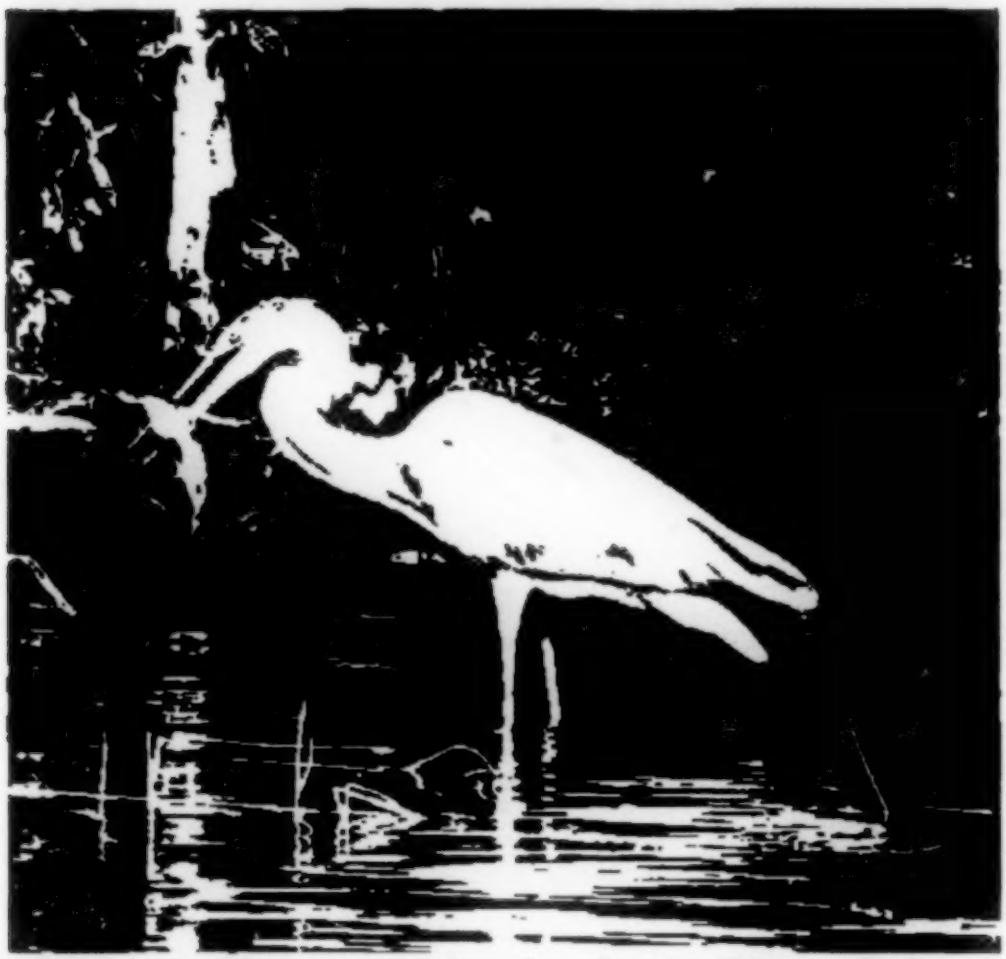

Figure 3: Heron on the St. Croix River. Deborah Weldele, Shore Lunch *(2014).*

More visibly, birds and birders are attracted to the St. Croix, which is home to Global and Continental Important Bird Areas recognized by the National Audubon Society. *See* Fig. 3, *supra*; Important Bird

Areas, National Audubon Society, http://netapp.audubon.org/iba/IBA (last visited Apr. 12, 2016) (identifying *inter alia,* the St. Croix Lake, the St. Croix River, and the St. Croix Bluffs Important Bird Areas). The St. Croix River's numerous fish and wildlife buttress the scenic value of the river and recreational activities such as hiking, birdwatching, photography, canoeing, and fishing.

Describing the St. Croix River as possessing discrete scenic, recreational, geologic, and wildlife value glosses over the reality that these characteristics of the river are interconnected. While characteristics such as scenery and geology are mutually supportive, recreation can interfere with other values. The Act and its implementing state regulations limit this interference by restricting high-impact uses to certain stretches of the river. For example, Minnesota and Wisconsin jointly developed a plan for the management of the Lower St. Croix River, which established five different "land management areas" to increase government flexibility in meeting specific land use goals. *See* Cooperative Management Plan, *supra,* at 23-31 (describing land management areas). The use of government regulations to manage land use is well established, especially when preserving commonly held natural resources. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) ("[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands"); *Just v. Marinette Cty.*, 201 N.W.2d 761, 768, 56 Wis. 2d 7, 17 (1972) ("The exercise of the police power in zoning must be reasonable and we

think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.").

II. Local Concern Led to Federal Protection for the St. Croix River.

A local desire for federal protection of the St. Croix River grew into the inclusion of most of the river in the 1968 Wild and Scenic Rivers Act. In 1964, a local power company announced a plan to construct a large power plant on the St. Croix River, drawing widespread public calls to protect the St. Croix River from development and pollution. Dunn, *supra*, at 36. This local desire to protect the St. Croix[8] manifested itself at the federal level in 1965, when U.S. Senators Walter Mondale of Minnesota and Gaylord Nelson of Wisconsin called for a "bill to provide for the establishment of the Saint Croix National Scenic Riverway." S. 897, 89th Cong. § 1 (1965). The bill languished, and in 1967 Senators Mondale and Nelson agreed to fold protection of the St. Croix River into the Wild and Scenic Rivers Act. Karamanski, *supra*, at 90. As the only eastern river in the Act, the St. Croix River gave the Act national scope. *Id.* at 102. The Act excluded the Lower St. Croix, however, because existing development and privately held shoreline would hinder federal acquisition and management of the riverine property. *Id.* at 90.

Passage of the Wild and Scenic Rivers Act in 1968 did not satisfy the local desire to protect the St. Croix River. Under pressure from members of

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[8] Wisconsin's interest in protecting its rivers led to enactment the nation's first state Wild and Scenic Rivers Act. Palmer, *supra*, at 150; *see also* Wis. Stat. § 30.26 (2016).

Congress representing the Lower St. Croix area, the Secretary of the Interior proposed splitting the unprotected Lower St. Croix into federal- and state-managed sections. Karamanski, *supra*, at 145-47. With some exceptions, "valley residents from Taylors Falls to Prescott, Wis., gave hearty approval to the plan, because it would limit commercial, industrial and residential development in the lush valley." Bob Goligoski, Lower St. Croix Plan Applauded, St. Paul Pioneer Press, June 9, 1971, at 27, *quoted in* Jay Krienitz & Susan Damon, "The Rivers Belong to the People": The History and Future of the Wild and Scenic River Protection in Minnesota, 36 Wm. Mitchell L. Rev. 1179, 1190 (2010). In 1972, Congress amended the Act to include the Lower St. Croix. *See* Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174, 1174 (codified at 16 U.S.C. §§ 1271, 1274). The bill passed "with Minnesota and Wisconsin politicians, both Republicans and Democrats, all in favor of 'saving' the Lower St. Croix." Eileen M. McMahon & Theodore J. Karamanski, North Woods River: The St. Croix River in Upper Midwest History 275 (2009). The upper twenty-seven miles of the Lower St. Croix were immediately included in the Wild and Scenic River system, to be managed by the National Park Service. Lower Saint Croix River Act of 1972 § 2. The amended Act also directed the Department of the Interior to designate the final twenty-five miles only on request of the governors of Minnesota and Wisconsin. *Id.*

Inclusion of that final stretch took four more years. Minnesota and Wisconsin quickly fulfilled their obligations, but the Department of the Interior delayed for years before yielding to congressional pressure. *See* Karamanski, *supra*, at 158-68. The

mayor of a riverside community wrote in support of designation: "Somewhere in this world of short-term decision making, protecting 'hindsides' and other 'people' problems has to come the vision of a tomorrow, a recognition of what our true legacy should be. The St. Croix is our legacy; it is worth saving." Letter from James Johnson, Mayor, Marine-on-St. Croix, Minnesota, to National Park Service, October 16, 1974, *quoted in* Karamanski, *supra*, at 167. On June 17, 1976 – more than a decade after Senators Nelson and Mondale first proposed federal protection for the St. Croix – the final, state-managed stretch of the St. Croix River joined the Wild and Scenic River system. *See* Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26,236 (June 25, 1976).

III. State and Local Ordinances Achieve the Wild and Scenic Rivers Act's Protection of the Lower St. Croix River.

The federal Wild and Scenic Rivers Act requires coordination with local and state legislation to function effectively – a partnership of federal, state, and local governments. For the St. Croix River, the Act facilitates cooperation between states, and between the states and the federal government. This cooperation is most visible in the management of the Lower St. Croix, where a higher portion of land is privately owned. The Act does not allow federal agencies to regulate private land use – that task is left to the states and their political subdivisions. In this instance, the State of Wisconsin enacted its own law, setting standards for the use of land along the Wild and Scenic St. Croix River; counties and towns are

then obligated to regulate land use at the local level in accord with state requirements. Private land use along the river is, thus, not regulated in response to federal mandates, but rather through local land use ordinances. Such ordinances represent the policy preferences of the citizens of Wisconsin and the St. Croix River community. Absent effective local land use regulation to protect them, many of the Wild and Scenic rivers like the St. Croix River would lose the outstandingly remarkable values that justified their federal designation.

The Act requires state concurrence in designating a river as "Wild and Scenic" – designation cannot happen administratively. A river is authorized for inclusion either by Congress, where the states have a voice, or on application by the legislatures of the relevant states. Wild and Scenic Rivers Act § 2. The Lower St. Croix was designated through a hybrid of these two processes, with federal legislation making designation dependent upon the application by Wisconsin and Minnesota. *See* Lower Saint Croix River Act of 1972 § 2. To comply, the two States adopted "a comprehensive master plan for the river area . . . [and] initiat[ed] a management and development program." Lower Saint Croix National Scenic Riverway: Inclusion in Wild and Scenic Rivers System, 41 Fed. Reg. at 26,236-37. In effect, the States adopted and implemented the Act's purpose to "protect and enhance" the Lower St. Croix. *See* Wisc. Stat. § 30.27; Minn. Stat. § 103F.351 (2016). Requiring state buy-in for designation of the St. Croix ensured that the two States possessed the necessary political will to cooperate with the federal government in accomplishing the purposes of the Act.

After a river becomes a designated part of the Wild and Scenic River system, state and federal cooperation continues. The Act authorizes the federal government to acquire fee title to land, but places limits on that authority for land that is owned by states or is part of an incorporated city. Wild and Scenic Rivers Act § 6. The Act also expressly permits federal authorities to "cooperate in the planning and administration" of designated rivers with state and local governments. *Id.* at § 10(e). Furthermore, the Act requires the federal government to "encourage and assist" state planning to consider "needs and opportunities for establishing state and local wild, scenic, and recreational river areas." *Id.* at § 11(a). In all, the design of the Act recognizes that effectively protecting rivers requires cooperation by all levels of government, and the text of the Act provides the mechanisms for that cooperation to occur. The St. Croix River provides an archetypal example of this mutually beneficial, cooperative approach to conservation.

County land use regulations protect the lower, state-managed portion of the Lower St. Croix. The Cooperative Management Plan was adopted by federal and state authorities as the federally-required "general management plan" for the lower riverway. Cooperative Management Plan, *supra*, at *iii*, 1. The Cooperative Management Plan recognizes that "[t]here must be a framework for federal, state, and local cooperative management." *Id.* at 15. It acknowledges that one of the chief issues facing the Lower St. Croix is increased development and changing land use. *Id.* at 17. Accordingly, "to protect the river's outstanding values," the plan recommends states adopt "[s]pecial zoning guidelines." *Id.* at 59.

These include "[m]inimum lot width and lot size standards . . . to ensure that development in certain areas does not change the character of the setting and to prevent additional impacts as seen from the river." *Id.*

The policy recommendations of the Cooperative Management Plan are incorporated into Wisconsin law, which directs the state's Department of Natural Resources to issue zoning rules consistent with "any pertinent guideline . . . promulgated by the secretary of the interior under the wild and scenic rivers act." Wis. Stat. § 30.27(2)(b); *see also* Minn. Stat. § 103F.351(4) (same). "Counties, cities, villages and towns lying, in whole or in part, within the areas affected by" each state's natural resources department regulations must adopt rules at least as stringent as the regulations. Wis. Stat. § 30.27(3); *see also* Minn. Stat. § 103F.351(4)(c) (same). St. Croix County adopted consistent zoning rules in 1976, which are the subject of the Murrs' challenge. *See* St. Croix County, WI, Code of Ordinances § 17.36(I)(4)(a) (2005).

A combination of state and federal action is required for a river to be designated as "Wild and Scenic," to formulate a management plan, and to regulate local land use. Democratic processes influence river management decisions at almost every stage.[9] Thus, the federal protection of the St. Croix River's outstanding scenic, recreational, and geologic values draws political legitimacy from its state and local implementation and the public support of the

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[9] The 2015 passage of Wisconsin Act 55, which reduces shoreline zoning restrictions, is an example of state democratic processes shaping zoning requirements. *See* 2015-2016 Wisc. Legis. Serv. Act 55 (2015 S.B. 21) 336-38 (West) (amending Wis. Stat. § 59.692).

State of Wisconsin and the greater St. Croix community.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

QUESTION PRESENTED

In a regulatory takings case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3(a), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF has members who reside, own property, and work in all 50 states.

Since its creation in 1977, MSLF and its attorneys have defended individual liberties and have been active in ligation opposing governmental actions that result in takings of private property. *See*, *e.g.*,

[1] The parties have consented to the filing of this amicus curiae brief. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Brandt v. United States, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (Fed. Cl. 2001) (represented Plaintiff); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (Plaintiff); *Horne v. Department of Agric.*, ___ U.S. ___, 135 S.Ct. 2419 (2015) (amicus curiae); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (amicus curiae). Moreover, the issue to be resolved in this case vis-à-vis the "parcel as a whole" concept described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978) will affect property owners across the country, including MSLF's members who own private property. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Petitioners ("Murrs") are four siblings who collectively own two parcels of property on the St. Croix River in Troy, Wisconsin. *Murr v. Wisconsin*, 359 Wis.2d 675, 2014 WL 7271581 at *1 (2014) ("*Murr II*"). The two properties are known as Lots E and F. In 1960, the Murrs' parents purchased Lot F. *Id.* The Murrs' parents built a cabin on Lot F and transferred title to Lot F to the family plumbing business. *Id.* Three years later, in 1963, the Murrs' parents

purchased Lot E as an investment property. *Id.* The Murrs' parents planned to develop Lot E separately or sell it to a third party in the future. *Id.*

Lots E and F are contiguous lots, each consisting of approximately 1.25 acres. *Murr v. St. Croix Bd. of Adjustment*, 796 N.W.2d 837, 841 (Wis. App. 2011) ("*Murr I*"). Both Lots E and F are "moderately level at the top and at the river, but are bisected by a steep 130 foot bluff. . . ." *Id.* In 1994, title to Lot F was transferred from the family plumbing business to the Murrs as a gift. *Murr II*, 2014 WL 7271581 at *1. Then, in 1995, title to Lot E was transferred from the Murrs' parents to the Murrs, also as a gift. *Id.*

Years later, the Murrs sought to sell Lot E to pay for improvements to the cabin on Lot F. *Id.* Only then did the Murrs become aware of St. Croix County Code of Ordinances, Land Use and Dev., subch. III.I, Lower St. Croix Riverway Overlay Dist. § 17.36, I.4.a ("Ordinance"), which prevents the Murrs from selling or developing Lot E on its own. *Id.*; *see also* Petitioner's Appendix D-1. Specifically, the Ordinance, which is based on Wis. Admin. Code § NR 118.08(4), requires that individual lots have a minimum "net project area" of one acre. *Murr II*, 2014 WL 7271581 at *1. Although Lots E and F are both larger than an acre, under the provisions of the Ordinance, Lots E and F have net project areas of .48 and .50 acres. *Murr I*, 796 N.W.2d at 841. Thus, under the Ordinance, Lots E and F are considered substandard. *See id.* at 842.

The Ordinance includes a "grandfather clause," which allows owners of substandard lots to exercise their property rights and avoid complying with the Ordinance so long as:

> 1. The lot is in *separate ownership from abutting lands*, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre or net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

Ordinance § 17.36, I.4.a (emphasis added). Because the Murrs own both Lots E and F, and because Lots E and F are contiguous, the Ordinance arbitrarily prohibits the Murrs from separately developing and/or selling their two parcels of property. Yet, if anyone else owned Lot E, he or she would be entitled to develop or sell Lot E independent from Lot F.

II. PROCEDURAL BACKGROUND.

The Murrs first sought variances from the Ordinance from the St. Croix County Board of Adjustment that would, *inter alia*, allow the Murrs to "sell or use two contiguous substandard lots in common ownership as separate building sites." *Murr I*, 796 N.W.2d at 841. The St. Croix County Board of Adjustment denied the Murrs' variance request and the denial

was upheld by the Wisconsin Court of Appeals. *Id.* at 840, 846.

After exhausting administrative and judicial remedies regarding the denial of their variance request, the Murrs initiated the instant action alleging an uncompensated taking of Lot E in violation of the Wisconsin and U.S. Constitutions. *Murr II*, 2014 WL 7271581 at *2. The Murrs argued below that "the Ordinance deprived them of all, or substantially all, beneficial use of their property." *Id.* at *3. Although the Murrs alleged only that Lot E was taken, the trial court considered the value of Lots E and F together. *Id.* at * 4. The Wisconsin Court of Appeals ultimately upheld the ruling of the trial court, agreeing that it was bound to consider Lots E and F as a single parcel of property, because the two lots are commonly owned and contiguous. *Id.* at *4-5. The Wisconsin Court of Appeals reached its conclusion, in part, based on its reading of the "parcel as a whole" concept, explained by this Court in *Penn Central*. *See id* at *14. Thereafter, the Wisconsin Supreme Court denied the Murrs' petition for review. *Murr v. Wisconsin*, 862 N.W.2d 899 (2015).

On August 14, 2015, the Murrs filed their petition for writ of certiorari to this Court, which was granted on January 15, 2016. As is demonstrated below, the decision of the Wisconsin Court of Appeals, that the "parcel as a whole" concept from *Penn Central* requires courts to aggregate legally distinct, commonly owned, contiguous properties for a regulatory takings analysis, is neither required by this

Court's takings jurisprudence nor compelled by the Constitution.

SUMMARY OF ARGUMENT

In *Penn Central*, this Court announced that in performing a regulatory takings analysis, courts should consider individual parcels of property as a whole, instead of considering individual property rights in isolation. There, this Court was unwilling to unbundle the property at issue into individual sticks, *i.e.*, divide a single parcel of private property into separate rights. 438 U.S. at 130-31. Specifically, the petitioner in *Penn Central* alleged a taking of its rights to the airspace above Grand Central Station. *Id.* at 136-37. This Court declined to separate the airspace rights from petitioner's other remaining rights in the fee property on which Grand Central Station is located. *Id.* at 138.

Nearly forty years later, lower courts are still grappling with the meaning of *Penn Central*. Courts continue to struggle with defining the denominator against which to perform a regulatory takings analysis. This Court has offered some guidance, by deeming any blanket rule requiring aggregation of a property owner's multiple properties as "extreme" and "unsupportable." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). Despite this Court's apparent rejection of an approach that would require aggregation of legally distinct, commonly

owned, contiguous properties in regulatory takings cases, the lower courts require more specific guidance.

The "parcel as a whole" concept as described by *Penn Central* does not create a rule that legally distinct, commonly owned, contiguous properties must be aggregated in regulatory takings analyses. Such an approach is contrary to the regulatory takings doctrine itself, which has been repeatedly described as an "ad hoc, factual" inquiry. *Lucas*, 505 U.S. at 1015 (citing *Penn Central*, 438 U.S. at 124); *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003).

Moreover, the strict aggregation rule as announced by the Wisconsin Court of Appeals, which will often, if not always, work to the detriment of landowners, defies the Fifth and Fourteenth Amendment's protections of private property. In light of the judiciary's duty to protect private property, this Court should expressly reject the decision below, which wrongly held that *Penn Central* requires courts to aggregate legally distinct, commonly owned, contiguous properties for takings analyses.

ARGUMENT

I. THE "PARCEL AS A WHOLE" CONCEPT IN *PENN CENTRAL* DOES NOT COMPEL CREATION OF A STRICT RULE REQUIRING COURTS TO AGGREGATE LEGALLY DISTINCT, COMMONLY OWNED, CONTIGUOUS PROPERTIES IN A REGULATORY TAKINGS ANALYSIS.

In *Penn Central*, the owner of fee property, upon which Grand Central Station in New York City is located, sought a variance from a historic preservation ordinance ("Landmark Law"), which prevented the owner from constructing an office building atop Grand Central Station. 438 U.S. at 113-18. After New York City designated Grand Central Station as a "landmark" governed by the Landmark Law, the fee owner sought permission to construct one of two different additions – either a 55-story office building, or a 53-story office building. *Id.* at 116-17. Both of the fee owner's proposed additions were denied. *Id.* at 117-18.

The fee owner challenged the denial of its request to construct the office building above Grand Central Station. *Id.* at 119. Based upon its misunderstanding of *United States v. Causby*, 328 U.S. 256, 261-62 (1946), the fee owner argued before this Court that the airspace located above Grand Central Station was a discrete property interest. *Penn Central*, 438 U.S. at 130. Thus, it was the fee owner's argument that since the Landmark Law prevented it from utilizing the airspace above the station, *i.e.*, by denying its

application to construct an office building, the Landmark Law effectuated a taking of its property interest in the airspace above the station. In response to that argument, this Court explained that:

> "Takings" jurisprudence does not divide a *single parcel* into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole. . . .

Id. at 130-31 (emphasis added).[2] This Court thus held that the Landmark Law did not effect a taking; however, the Court's holding and the "parcel as a whole" concept is inapplicable to the instant action.

The Wisconsin Court of Appeals incorrectly extended the "parcel as a whole" concept beyond reason and to the detriment of the Murrs. Unlike the plaintiff in *Penn Central*, the Murrs did not allege a taking of a discrete property interest within their fee interest. Instead, the Murrs initiated the instant action vis-à-vis their full, fee title interest in Lot E. *Murr II*, 2014 WL 7271581 at * 2 ("The Murrs alleged

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[2] However, the three dissenting Justices in *Penn Central* described the Landmark Law as violating the Fifth Amendment "[i]n a very literal sense." 438 U.S. at 142 (Rehnquist, J., dissenting).

that the Ordinance . . . deprived them of 'all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.'"). The Wisconsin Court of Appeals wrongly aggregated Lots E and F together, thereby doubling the size of the denominator, against which it performed its takings analysis. *See Lucas*, 505 U.S. at 1016 n.7 (Describing a situation "where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity" as "extreme" and "unsupportable."); *Bowles v. United States*, 31 Fed. Cl. 37, 41 n.4 (1994) (property owner who owned multiple contiguous lots in a subdivision was allowed to bring a takings claim for a single lot on which he was precluded from building a single family home).

Indeed, defying logic, the Wisconsin Court of Appeals twisted *Penn Central*'s clear language regarding a "single parcel," 438 U.S. at 130, into a strict rule "that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Murr II*, 2014 WL 7271581 at * 5. Then, under its false assumption that it must consider the value of Lots E and F together, the court found that a taking had not occurred because if the Murrs razed their existing cabin on Lot F they could build a new residence "located entirely on Lot E, entirely on Lot F, or it could straddle both

lots." *Murr II*, 2014 WL 7271581 at * 5.[3] Contrary to the decision of the Wisconsin Court of Appeals, this interpretation is neither required nor sanctioned by *Penn Central*. Essentially, the aggregation rule announced by the Wisconsin Court of Appeals requires the Murrs to cede their right to use Lots E and F independent of each other to St. Croix County.

Moreover, the analysis endorsed by this Court in *Penn Central* was merely that regulatory takings analyses are "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124. This imprecise definition of regulatory takings analyses counsels against reading *Penn Central* as creating a strict aggregation rule. Based upon the foregoing, this Court should affirmatively reject application of a strict aggregation rule in regulatory takings analyses and reverse the judgment of the Wisconsin Court of Appeals.

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[3] Yet, the proper question in a regulatory takings analysis is: "'What has been taken?' not 'What has been retained?'" Richard A. Epstein, *Takings Private Property And The Power Of Eminent Domain* 61-62 (Harvard Univ. Press 1985); *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 846-47 (9th Cir. 2001) ("Resolving a Fifth Amendment takings claim requires a fact specific inquiry into *what has been taken* and what compensation is due.") (emphasis added).

II. AGGREGATING FEE PROPERTY FOR A TAKINGS ANALYSIS IS ABHORRENT TO THE CONSTITUTION.

A. It Is The Duty Of The Judiciary To Protect Private Property.

Protection of private property is essential to liberty and a free society. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection*, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring) ("[T]he right to own and hold property is necessary to the exercise and preservation of freedom."); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property."); *see Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."). For example, in 1897, this Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty" . . . "is that of enjoying private property without undue interference or molestation." . . . The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. *Indeed, in a free government, almost all other*

> *rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."*

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations and quotations omitted) (emphasis added).

To guarantee the protection of private property, the Framers separated the government's powers into three co-equal branches, and intended for the judiciary to be the ultimate protector of property and liberty. *United States v. Lee*, 106 U.S. 196, 218-20 (1882) (acknowledging the judiciary must enforce the guarantees of the Fifth Amendment); Clint Bolick, *David's Hammer: The Case for an Activist Judiciary* 35-47 (2007). For example, Alexander Hamilton explained that it is the duty of the judiciary "to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist Papers*, Federalist No. 85, 466 (Hamilton) (Clinton Rossiter ed., 1961); *accord Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is" and to declare that a law "repugnant to the [C]onstitution, is void.").

Only if the judiciary fulfills its duty will property and liberty be secure. *See* Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 47-74 (1997) ("*Property and Freedom*"); Mark L. Pollot, *Grand Theft and Petit*

Larceny: Property Rights in America 56-66 (1993). Despite its duty to protect private property rights, the Wisconsin Court of Appeals wrongly extended the "parcel as a whole" concept to the detriment of private property owners, thereby extinguishing the Murrs' private property interests in contravention of the Fifth and Fourteenth Amendments to the U.S. Constitution.

B. There Is No Constitutional Basis For A Rule Requiring Aggregation In A Takings Analysis.

Because property is of the utmost importance, the Fifth and Fourteenth Amendments to the U.S. Constitution expressly prohibit the government from taking private property for public use without just compensation. U.S. Const. amends. V, XIV; *Olson v. United States*, 292 U.S. 246, 255 (1934) ("It is the property and not the cost of it that is safeguarded by state and Federal Constitutions"). The Constitution protects private property, regardless of the amount of property owned by an individual. *See Calder v. Bull*, 3 Dall. 386, 388 (1798) ("[A] law that takes property from A and gives it to B . . . is against all reason and justice. . . ."); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion) (holding the same for personal property). To carry out the intent of the Framers and remain faithful to the Constitution, courts must ensure that private property rights are protected from government abuse. Therefore, even if *Penn Central* required aggregation of legally distinct,

contiguous, commonly owned properties for takings analyses, it is the duty of this Court to disavow such a rule because it runs afoul of the Constitution.

The present issue, whether a rule of aggregation is required in regulatory takings cases, has been raised in both legal opinions and scholarship. *See, e.g.*, *Lucas*, 505 U.S. at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."); *id.* ("Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.") (citations omitted); John E. Fee, *The Takings Clause As A Comparative Right*, 76 S. Cal. L. Rev. 1003, 1030 (2003) ("Whether a person is deemed to have lost all economically viable use of his or her land depends on the relevant parcel of land that is used as the basis for comparison."); Marc R. Lisker, *Regulatory Takings And The Denominator Problem*, 27 Rutgers L. J. 663, 666 (1996) ("The key issue in making the takings determination . . . is defining the appropriate unit of property against which to conduct the . . . takings inquiry.").

The foregoing demonstrates the importance of the Court's decision in this case. In defining the denominator in regulatory takings analyses, this Court must ensure that the intent of the Framers is carried out while remaining faithful to the Constitution's protections of private property. Likewise, a

solution should be easy to understand and apply. Common sense supports the proposition that discrete fee property interests do not change based solely on happenstance, such as common ownership. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331-32 (2002) ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest.) (citing Restatement of Property §§ 7-9 (1936)); *Lucas*, 505 U.S. at 1027 ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); *id.* at 1029 ("Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself. . . ."); Steven J. Eagle, *The Parcel And Then Some: United Of Ownership And The Parcel As A Whole*, 36 Vt. L. Rev. 549, 570 (2012) ("Each legal parcel is a separate parcel for takings analysis, unless and until the facts indicate otherwise."). Thus, in determining the denominator in a regulatory takings analysis, courts should always begin with the assumption that the denominator in the takings equation is an individual parcel of property. To do otherwise undermines the sanctity of private property and disturbs a property owner's reliance upon his or her distinct fee properties. *See* Bernard H. Siegan, *Property and Freedom*, *supra*, at 5-9 (Demonstrating

that a major purpose of securing property rights is "to maintain a viable economy upon which general welfare depends.").

Moreover, the Fifth and Fourteenth Amendments' guarantees should not be subject to such a great degree of manipulation. Individual parcels of property should each be subject to the same constitutional protections, regardless of ownership. *See, e.g.*, Eagle, *The Parcel And Then Some*, 36 Vt. L. Rev. at 570 ("Large landowners are disadvantaged in their constitutional rights compared to small landowners for no apparent constitutional reason other than to find some limit to the regulatory takings doctrine."). Transforming the "parcel as a whole" concept from *Penn Central* into a strict aggregation rule will lead to attempts by government to manipulate regulations to avoid paying property owners just compensation. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] state, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power."). It could also encourage manipulation by landowners to protect their private property interests. Eagle, *The Parcel And Then Some*, 36 Vt. L. Rev. at 566 ("[M]anipulation of 'parcel as a whole' is a game that either side can play. If owners can engage in 'conceptual severance,' then regulators can engage

in 'conceptual agglomeration.'" (footnote omitted)). Neither outcome is a logical result of the protection afforded private property by the Constitution. To avoid this type of manipulation and to ensure that courts adequately protect private property, this Court should reject the Wisconsin Court of Appeals' erroneous interpretation of the "parcel as a whole" concept.

III. A STRICT AGGREGATION RULE WOULD CREATE A MYRIAD OF PROBLEMS.

Another potential problem with the imposition of a blanket aggregation rule in regulatory takings cases arises in the context of split estates. For example, many states recognize mineral estates as an estate independent from the surface estate. *See, e.g.*, *Slaaten v. Cliff's Drilling Co.*, 748 F.2d 1275, 1277 (8th Cir. 1984) ("Once the mineral and surface rights have been separated, two estates exist, which are as distinct as if they contained two parcels of land." (citing *Bilby v. Wire*, 77 N.W.2d 882, 889 (N.D. 1956)); *Atlantic Refining Co. v. Noel*, 443 S.W.2d 35, 40 (Tex. 1968) (same); *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 47 N.E.2d 96, 98 (Ill. 1943) (same); *Johnson v. Gray*, 410 P.2d 948, 950 (N.M. 1966) (same); *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 234-35 (Pa. 1943) (recognizing three estates: the surface estate, the mineral estate, and the support estate). It is axiomatic that each individual estate is protected from takings without just compensation by the guarantees of the Fifth and Fourteenth Amendments. *Pennsylvania Coal Co. v. Mahon*, 260 U.S.

393, 414 (1922) (Recognizing that the Constitution protects the "very valuable [mineral] estate."); *Miller Bros. v. Dep't of Natural Res.*, 513 N.W.2d 217, 220 (Mich. App. 1994) (recognizing the state and federal constitutions protect individual oil and gas estates).

In the context of split estates, application of a strict aggregation rule would almost always harm the property owner. For example, if a property owner owns both the mineral estate and the surface estate in the same property, and the government enacts a regulation that destroys one of the two estates, should the property owner recover nothing? *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) ("The [*Penn Central*] Court gave no guidance on how one is to distinguish a 'discrete segment' from a 'single parcel.'"). It would appear that application of the strict aggregation rule would preclude the property owner from recovering just compensation, merely because one of the property owner's two separate estates might retain some use or value. Such an outcome cannot have been intended by the Framers who believed:

> [T]he right of acquiring and possessing property and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires;

> its security was one of the objects, that induced them to unite in society.

VanHorne's Lesse v. Dorrance, 2 Dall. 304, 310 (1795).

Finally, the blanket imposition of the aggregation rule also implicates equal protection and due process concerns. *See, e.g.*, Steven J. Eagle, *Penn Central And Its Reluctant Muftis*, 66 Baylor L. Rev. 1, 21 (2014) ("The Court has continued to invoke *Armstrong*'s dicta in a way that blurs the distinction between the Equal Protection and Due Process Clauses and the Takings Clause." (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005))); Fee, *The Takings Clause As A Comparative Right*, 76 S. Cal. L. Rev. at 1053 ("[T]he ideal of formal equality . . . governs the implementation of other constitutional provisions, such as the Equal Protection Clause. Our society has long recognized that a law is more just if it binds everyone in a society equally."). Plainly, the Constitution prohibits the government from taking private property without paying the property owner just compensation. Treating a property owner differently based solely on whether he or she owns multiple properties (or multiple estates in the same property), is not what the Framers envisioned in drafting the Constitution. *See* Siegan, *Property and Freedom*, *supra*, at 29 ("With respect to property, the Constitution imposes on government the universal command that 'Thou shalt not steal.' Theft is wrong whether committed by one person or the majority of persons.").

Furthermore, conditioning constitutional guarantees based upon the amount of property an individual owns is impermissible. *See Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S.Ct. 2586, 2595 (2013) ("We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine." (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974))). Therefore, a property owner's entitlement to just compensation for property taken by the government cannot be conditioned on whether or not the owner owns multiple properties and whether or not the other properties are contiguous to the property that has been taken. Indeed, the Constitution requires protection of private property regardless of ownership. Therefore, this Court should formally renounce the strict aggregation rule created by the Wisconsin Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should reject the Wisconsin Court of Appeals' reading of *Penn Central* and disavow a strict rule requiring that two legally distinct, commonly owned, contiguous parcels must be aggregated for takings analysis purposes.

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RECORD
AND
BRIEFS

No. 15-214

In the Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Wisconsin Court of Appeals

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The National Association of Counties is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The Council of State Governments is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National League of Cities is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to amicus briefs.

people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Many of amici's members are affiliated with local governments that have zoning ordinances with merger provisions like the one challenged in this case.

SUMMARY OF ARGUMENT

"Merger" provisions like the one in this case have been a common, well-accepted feature of zoning ordinances for decades, because they reconcile the community's interest in preventing the harms caused by congestion with the landowner's interest in developing a substandard lot. These provisions are so common, and have been in place for so long, that they are within the reasonable expectations of landowners and their lawyers.

A. Minimum lot size requirements are found in virtually all zoning ordinances. They serve many important purposes, including limiting traffic congestion, protecting the environment, conserving the water supply, and sustaining neighboring property values.

B. While zoning ordinances typically phase out nonconforming *uses* over an amortization period, most nonconforming *lots* are permanently exempt from minimum size requirements, because amortization will not work for nonconforming lots. Local governments have accordingly sought some other way to strike a sensible balance between private and public interests. The solution has been merger. Where the owner of an undeveloped nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one for this purpose. The lots are typically not literally merged. The sole effect of most "merger" provisions is simply that the exemption for nonconforming lots is denied to a landowner who also owns an adjacent lot.

Such merger provisions have been features of local zoning ordinances for a long time. Towns began enacting them in the 1920s. They were very common by the 1960s, because local governments and state courts recognized that they represent an appropriate middle ground between two unattractive extremes—prohibiting the development of substandard lots, which would be a hardship to their owners, and allowing the development of *all* substandard lots,

which would be a hardship to neighbors and the community.

C. Today, there are countless ordinances all over the country with merger provisions like the one challenged in this case. Several states have statutes specifically authorizing local governments to include merger provisions in their ordinances. In some states, merger is a common law doctrine that can apply even in the absence of a local ordinance requiring it. In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority.

D. The Takings Clause protects property owners against interference with their reasonable expectations. Some forms of local land use regulation, including lot size minima and the merger of nonconforming lots that often accompanies lot size minima, are so prevalent and so well-known that they could surprise no reasonable property owner. A well-advised owner or purchaser of land should expect that the land may be governed by a lot size minimum and an associated merger provision.

E. Zoning is the quintessential function performed by local governments, because every neighborhood has different characteristics and a different mix of residents. This wide variation among local communities has led to an equally wide variation in the use of merger provisions. These decisions are made by state and local elected officials who are closely responsive to community residents. Local jurisdictions constantly adjust zoning rules, including the rules governing the merger of adjacent nonconforming lots, to re-

spond to local conditions and preferences. They should be allowed to continue to do so.

ARGUMENT

"Merger" provisions like the one challenged in this case have been a common, well-accepted feature of zoning ordinances for decades.

Petitioners' argument rests on the assumption that the St. Croix County ordinance is somehow unusual or surprising in allowing the development of a substandard lot only if the lot is in separate ownership from adjacent lots. But this assumption is incorrect. Zoning ordinances all over the country include provisions just like the one in St. Croix County, and they have included such provisions for decades. These "merger" provisions are common because they serve an important purpose: They reconcile the community's interest in preventing the harms caused by congestion with the landowner's interest in developing a substandard lot. These provisions are so common, and have been in place for so long, that they are well within the reasonable expectations of landowners and their lawyers.

A. Minimum lot size requirements have long been the standard way of preventing the harms caused by congestion.

Since the advent of zoning, state and local governments have sought to regulate the density of development, in order to prevent overcrowding, to avoid depleting natural resources, to preserve the

character of communities, and to sustain property values. Minimum lot size requirements "are by far the most common form of density control in zoning ordinances." *Validity of Zoning Laws Setting Minimum Lot Size Requirements*, 1 A.L.R. 5th 622 (1992). Today, lot size requirements can be "found in virtually all zoning ordinances." 1 Douglas W. Kmiec and Katherine Kmiec Turner, *Zoning and Planning Deskbook* 109 (2015).

Courts have consistently recognized that minimum lot size requirements serve important public purposes, including

> preventing the evils of overcrowding and the ill effects of urbanization, control of traffic, protection of property values, protection of aesthetics and the character of an area, protection of open space, the provision of adequate public facilities, protection of the water supply, preventing erosion and providing emergency access, preventing water pollution, preservation of agricultural lands, and the protection of environmentally sensitive areas including wildlife habitat.

3 *Rathkopf's The Law of Zoning and Planning* § 51.12 (4th ed. Westlaw) (citations omitted).

As early as 1926, this Court noted that "[t]here is no serious difference of opinion in respect of the validity of laws and regulations fixing ... the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). More recently, the

Court observed that minimum lot size requirements are a way of protecting a town's residents "from the ill effects of urbanization." *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). The state courts have likewise emphasized the value of lot size restrictions in limiting traffic congestion, *Simon v. Town of Needham*, 42 N.E.2d 516, 518 (Mass. 1942), safeguarding the environment, *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 258 (N.J. 1991), conserving the water supply, *Ketchel v. Bainbridge Twp.*, 557 N.E.2d 779, 783 (Ohio 1990), and sustaining neighboring property values, *La Grange State Bank v. Village of Glen Ellyn*, 591 N.E.2d 480, 486 (Ill. App. Ct. 1992).

B. Merger has long been recognized as the most reasonable way to reconcile the landowner's interest in developing a nonconforming lot with the community's interest in preventing congestion.

A "nonconforming" lot is one that was of lawful size before the enactment of a minimum lot size requirement, but is now too small. Nonconforming *lots* are analogous to nonconforming *uses*—that is, uses of land that were once lawful but do not comply with a new zoning restriction, as when a business finds itself located within an area newly zoned for residential use. Nonconforming lots and nonconforming uses are allowed to continue, because of the obvious unfairness in forcing them to terminate immediately.

But there is one major difference between nonconforming lots and nonconforming uses. Nonconforming uses are typically phased out over time. 4

Rathkopf's The Law of Zoning and Planning § 74:18 (4th ed. Westlaw). Zoning ordinances often establish an "amortization" period, which "simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements." *Village of Valatie v. Smith*, 632 N.E.2d 1264, 1266 (N.Y. 1994). Provided the amortization period is long enough to allow the owner to recoup his investment, courts have generally concluded that amortization strikes an appropriate balance between the landowner's reasonable expectations and the public's interest in advancing the goals served by the zoning ordinance. 2 Patricia E. Salkin, *American Law of Zoning* § 12:23 (5th ed. Westlaw).

Amortization will not work for nonconforming lots, however, because the size of a lot cannot be phased out over time. Most nonconforming lots are thus grandfathered in permanently; they are forever exempt from the minimum lot size requirement that would otherwise be applicable. *Id.* § 12:12. But this outcome limits the community's ability to accomplish the goals the lot size requirement was intended to serve. Because of the impossibility of amortizing nonconforming lots, local governments have sought some other way to strike a sensible balance between private and public interests.

The solution has been merger. Where the owner of an undeveloped nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one

for this purpose. The lots are typically not literally merged. The sole effect of most "merger" provisions is simply that the exemption for nonconforming lots is denied to a landowner who also owns an adjacent lot. *See, e.g., McQuillin: The Law of Municipal Corporations* § 25:179.6 (3d ed. Westlaw) ("Municipalities often have ordinances which treat commonly owned, contiguous lots, one or more of which are nonconforming, as one conforming lot."); *Jock v. Zoning Bd. of Adjustment*, 878 A.2d 785, 794 (N.J. 2005) ("The term 'merger' is used in zoning law to describe the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation.").

Such merger provisions have been features of local zoning ordinances for a very long time. Great Neck Estates, New York, enacted one in 1926. *Ferryman v. Weisser*, 158 N.Y.S.2d 587, 588 (N.Y. App. Div. 1957). Bayville, New York, enacted one in 1927. *Flanagan v. Zoning Bd. of Appeals*, 149 N.Y.S.2d 666, 667 (N.Y. Sup. Ct. 1956), *aff'd*, 151 N.Y.S.2d 618 (N.Y. App. Div. 1956). Nahant, Massachusetts, enacted one in 1940. *Clarke v. Bd. of Appeals*, 155 N.E.2d 754, 755 & n.3 (Mass. 1959). Attleboro, Massachusetts, enacted one in 1942. *Vetter v. Zoning Bd. of Appeals*, 116 N.E.2d 277, 277-78 (Mass. 1953). Skokie, Illinois, enacted one in 1946. *Weber v. Village of Skokie*, 235 N.E.2d 406, 410 (Ill. App. Ct. 1968). Hempstead, New York, and Wellesley, Massachusetts, both enacted theirs in 1951. *Cabral v. Young*, 177 N.Y.S.2d 548, 549 (N.Y. Sup. Ct. 1958); *Sorenti v. Bd. of Appeals*, 187 N.E.2d 499, 500 & n.1

(Mass. 1963). Weston, Connecticut, enacted one in 1953. *Bankers Trust Co. v. Zoning Bd. of Appeals*, 345 A.2d 544, 546 (Conn. 1974). Berlin, Connecticut, enacted one in 1954. *Schultz v. Zoning Bd. of Appeals*, 130 A.2d 789, 790 (Conn. 1957). Redford, Michigan, enacted one sometime before 1957. *Korby v. Twp. of Redford*, 82 N.W.2d 441, 443-44 (Mich. 1957). Old Lyme, Connecticut, enacted one in 1957. *Corsino v. Grover*, 170 A.2d 267, 269 (Conn. 1961).

By 1960, merger provisions were so common that the American Society of Planning Officials included one in the Model Zoning Ordinance it published for the benefit of local governments nationwide. American Society of Planning Officials, *The Text of a Model Zoning Ordinance* 26 (2d ed. 1960). A few years later, the leading zoning treatise of the era explained that the owner of a nonconforming lot "is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance." 2 Robert M. Anderson, *American Law of Zoning* § 8.49 (1968); *see also* John R. McGill, Note, *Substandard Lots and the Exception Clause—"Checkerboarding" as a Means of Circumvention*, 16 Syracuse L. Rev. 612, 614 (1965) ("most ordinances include a section which exempts substandard lots in existence at the time the ordinance is enacted (or amended) provided they are held in single, separate ownership").

Merger provisions became common because local governments and state courts recognized that they represent an appropriate middle ground between two unattractive extremes—prohibiting the development of substandard lots, which would be a hardship to their owners, and allowing the development of *all* substandard lots, which would be a hardship to neighbors and the community. As the Maine Supreme Court explained, a merger provision "is designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property." *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015). *See also Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2007) (observing that merger provisions "balance the interests of the public and private ownership").

On one side of the balance, the public has an interest in "the reduction of nonconforming lots," *Goulet v. Zoning Bd. of Appeals*, 978 A.2d 1160, 1165 (Conn. App. Ct. 2009), which exacerbate the congestion that motivated the enactment of the lot size minimum. "Otherwise, subdivisions in their infancy could perpetuate for years the problems zoning was designed to eliminate." *York Twp. Zoning Bd. of Adjustment v. Brown*, 182 A.2d 706, 707 (Pa. 1962) (citation and internal quotation marks omitted). On the other side of the balance, while any restriction on development will have some effect on the owner of property, "the financial hardship on the owner in complying is not nearly as great [where he is able] to conform by enlarging lot sizes or combining two lots

into one." *Id.* The state courts have thus widely recognized that merger provisions "operate to decrease congestion in the streets and to prevent the overcrowding of land," *Brum v. Conley*, 572 A.2d 1332, 1334 (R.I. 1990), without imposing unreasonable burdens on individual landowners.

C. For this reason, countless ordinances all over the country include merger provisions like the one challenged here.

Merger provisions are extremely common. Several states have enacted statutes specifically authorizing local governments to include merger provisions in their zoning ordinances. *See, e.g.*, Cal. Govt. Code § 66451.11 ("A local agency may, by ordinance which conforms to and implements the procedures prescribed by this article, provide for the merger of a parcel or unit with a contiguous parcel or unit held by the same owner if any one of the contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size"); Mass. Gen. L. ch. 40A, § 6 (providing that lot size minimum requirements shall not apply to a nonconforming lot that "was not held in common ownership with any adjoining land"); Minn. Stat. § 394.36(5)(d) (providing that nonconforming lots "must be combined with the one or more contiguous lots so they equal one or more conforming lots as much as possible"); N.M. Stat. § 47-6-9.1 (stating power of local governments to require "consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels"); R.I. Gen. L. § 45-24-38 (authorizing local gov-

ernments to provide "for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots"); Vt. Stat. tit. 24, § 4412(2)(B) (authorizing local governments to provide that "if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the conforming lot shall be deemed merged with the contiguous lot").

In some states, merger is a common law doctrine that can apply even in the absence of a local ordinance requiring it. *See, e.g., Timperio v. Zoning Bd. of Appeals*, 993 N.E.2d 1211, 1215 (Mass. App. Ct. 2013) ("It is well settled that '[u]nder the common-law merger doctrine, when adjacent nonconforming lots come into common ownership, they are normally merged and treated as a single lot for zoning purposes.'") (quoting *Hoffman v. Bd. of Zoning Appeal*, 910 N.E.2d 965, 971 (Mass. App. Ct. 2009)); *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 724 A.2d 34, 38 (Md. 1999) (discussing merger); *Remes v. Montgomery Cty.*, 874 A.2d 470, 485 (Md. 2005) (referring to the discussion of merger in *Friends of the Ridge* as "a statement of the common law").

In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority. *See, e.g., Neumann v. Zoning Bd. of Appeals*, 539 A.2d 614, 616 (Conn. App. Ct. 1988) (noting that "many zoning ordinances" in the state include merger provisions, without any reference to legislation specifically authorizing them).

Today, there are countless ordinances all over the country with merger provisions like the one challenged in this case. The following list of municipalities and counties is far from complete, but it gives a sense of how common such provisions are. From Palm Springs to Providence, from Missoula to Miami, from Minneapolis to New Orleans, merger provisions are a staple of local zoning ordinances.

Alachua County, Florida. Unified Land Development Code § 408.16(a) (https://www.municode.com/library/fl/alachua_county/codes/code_of_ordinances?nodeId=PTIIIUNLADECO_TIT40LADERE_CH408NO).

Alexandria, Virginia. Zoning Ordinance § 12-401(A) (https://www.municode.com/library/va/alexandria/codes/zoning?nodeId=ARTXIINONO_12-401).

Americus, Georgia. Code of Ordinances § 94-266 (https://www.municode.com/library/ga/americus/codes/code_of_ordinances?nodeId=PTIICOOR_CH94ZO).

Amherst County, Virginia. Zoning Ordinance § 601.01(1) (https://www.municode.com/library/va/amherst_county/codes/code_of_ordinances?nodeId=COCO_APXAZOSU_ARTVIGEPR_601NOLOBUUS).

Atlantic Beach, North Carolina. Unified Development Ordinance § 17.2(B) (https://www.municode.com/library/nc/atlantic_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH18UNDEOR_ART17NOSI).

Auburn, Maine. Code of Ordinances § 60-38 (https://www.municode.com/library/me/auburn/codes/

code_of_ordinances?nodeId=PTIICOOR_CH60ZO_ARTIIGEPR).

Babylon, New York. Zoning Code § 213-231 (http://ecode360.com/6811368).

Baker, Montana. Code of Ordinances § 17.36.020(b) (https://www.municode.com/library/mt/baker/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.36NOUSLOST).

Barrington, Rhode Island. Zoning Code § 185-26(A) (http://ecode360.com/7121166). *See McKendall v. Town of Barrington*, 571 A.2d 565, 566 n.2 (R.I. 1990) (discussing an earlier version).

Bay City, Michigan. Code of Ordinances § 122-523 (https://www.municode.com/library/mi/bay_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH122ZO_ARTXXIINOUS).

Becker County, Minnesota. Zoning Ordinance, ch.3, § 8(C)(1) (http://www.co.becker.mn.us/dept/planning_zoning/PDFs/ordinance/CHAPTER%203%20-%20NONCONFORMITIES.pdf); *see In re Holzgrove*, 2006 WL 920950, *1 (Minn. Ct. App. 2006).

Belvedere, California. Municipal Code § 18.34.010(A) (http://www.cityofbelvedere.org/DocumentCenter/Home/View/495).

Berkeley, California. Municipal Code § 21.52.020 (http://www.codepublishing.com/CA/Berkeley/).

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Wall Township, New Jersey. Land Use and Development Regulations § 140-131 (http://ecode360.com/9589206); *see Jock v. Zoning Bd. of Adjustment*, 878 A.2d 785, 794-96 (N.J. 2005).

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York, Maine. Zoning Ordinance § 17.3.1(B)(1) (http://www.yorkmaine.org/LinkClick.aspx?fileticket=LmrM2fQ4j08%3d&tabid=181&mid=1633); *see Robertson v. Town of York*, 553 A.2d 1259, 1259-60 (Me. 1989) (discussing an earlier version).

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D. These merger provisions are so common, and have been in place for so long, that they are within the reasonable expectations of landowners and their lawyers.

The Takings Clause protects property owners against interference with their reasonable expectations. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Some forms of local land use regulation, including lot size minima and the merger of nonconforming lots that often accompanies lot size minima, are so prevalent and so well-known that they could surprise no reasonable property owner. These rules have been common for more than half a century. They are familiar parts of the landscape. Competent lawyers know them and advise their clients accordingly.

Indeed, with just a few minutes of research, one can find many periodicals and web pages explaining that the purchaser of a vacant nonconforming lot should be careful to ascertain whether the lot is governed by a merger provision. *See, e.g.*, Kathleen Deegan Dickson, *The Law of Merger*, N.Y. Real Estate J., Nov. 11, 2014 ("Take caution when purchasing a vacant parcel of land [because of] the possibility of the merger of lots.") (http://nyrej.com/78995); Anthony S. Guardino, *Lot Merger and Single and Separate Exemptions*, N.Y. Law J. Long Island Weekly, Dec. 11, 2004 ("lot merger frequently play[s] a crucial role in the zoning approval process") (http://www.farrellfritz.com/wp-content/uploads/art-183.pdf); Anne L.H. Studholme, *Understanding "Merger" of*

Nonconforming Lots, http://www.hillwallack.com/?t=40&an=15702 ("Those thinking of buying a parcel composed of undersized lots need to understand the doctrine of merger."); Lloyd Pilchen, *When Two Become One: A Look at the Law of Merger of Adjoining Parcels*, American Surveyor, vol. 7, issue 4 (2010) ("Local governments typically only seek to impose a merger when [the adjoining lot] does not conform to today's zoning standards, such as minimum lot area or street frontage.") (http://www.amerisurv.com/content/view/7419); Richard Gallogly, *Merger by Acquisition: Grandfathered Status Can Be Lost*, Mass. Land Use Monitor, Aug. 22, 2013 ("the grandfathered status of a lawful pre-existing nonconforming lot is not perpetual, and can be lost if the lot later comes into common ownership with adjoining land") (http://www.massachusettslandusemonitor.com/zoning/the-status-of-a-pre-existing-nonconforming-lot-is-subject-to-change/).

Practice guides for attorneys likewise advise that local zoning ordinances may treat a nonconforming lot as merged with an adjoining lot in common ownership. *See, e.g.*, 28 Arthur L. Eno, Jr., et al., *Massachusetts Practice: Real Estate Law* § 23.6 (4th ed. Westlaw) ("Always check the local zoning bylaw or ordinance .... [B]uilding lots which do not meet current zoning dimensional requirements, and which came into common ownership or control subsequent to the zoning change that rendered them nonconforming, are merged into a single lot for zoning purposes."); 9B Robert A. Fuller, *Connecticut Practice: Land Use Law & Practice* § 53:6 (4th ed. Westlaw) ("there can be lot merger ... where the zoning regula-

tions contain a merger provision for nonconforming contiguous lots"); 36 David J. Frizell and Ronald D. Cucchiaro, *New Jersey Practice: Land Use Law* § 15.7 (3d ed. Westlaw) (suggesting that merger can be easily avoided by titling adjacent nonconforming parcels in different entities, because "[s]o long as the legal titles are kept separate, the doctrine will not be used to merge lots that are under a single 'dominion and control.'"); H. Bernard Waugh, Jr., *"Grandfathered"—The Law of Nonconforming Uses and Vested Rights*, N.H. Bar. J., March 1990, 17, 30 ("The substandard lot problem ... deals with whether the USE of a subdivision lot is 'grandfathered.' The 'merger' problem, on the other hand, deals with whether the SEPARATION of that lot from adjoining property in common ownership, is 'grandfathered.'").

In short, a well-advised owner or purchaser of land should expect that the land may be governed by a lot size minimum and an associated merger provision. These are common zoning rules that are well within the reasonable expectations of landowners and their lawyers.

E. State and local governments should have leeway to respond to local conditions.

"[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). Every neighborhood has different physical characteristics and a different mix of residents, so what works for one place will not work for another. Zoning is thus "the quintessentially local activi-

ty." *Evans v. United States*, 504 U.S. 255, 295 (1992) (Thomas, J., dissenting). "It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

This wide variation among local communities has led to an equally wide variation in the use of merger provisions. Many towns have them. Many others do not. Some local jurisdictions apply merger to all contiguous commonly-owned nonconforming parcels. Other jurisdictions apply merger to such parcels only if certain conditions are met. These decisions are made by local elected officials who are closely responsive to community residents. If the residents of a town want a merger provision, they can enact one, and if they want to repeal a merger provision, they can repeal one. This kind of choice is the bread and butter of local government. It has never been thought to require the imposition of a nationally uniform rule.

State governments are likewise responsive to the views of state residents. In New Hampshire, for example, after the state supreme court held that towns had the authority to merge nonconforming contiguous lots, *Sutton v. Town of Guilford*, 992 A.2d 709, 718-19 (N.H. 2010), the state legislature enacted statutes requiring the owner's consent before lots could be merged and allowing merged lots to be restored to their premerger status at the request of the owner. N.H. Stat. §§ 674:39-a, 674:39-aa(II). In Ver-

mont, until 2003, state law required towns with zoning ordinances to merge adjacent nonconforming lots. *See* former Vt. Stat. tit. 24, § 4406(1)(A) (repealed 2003). The legislature replaced this requirement with a statute allowing towns to make this decision for themselves. Vt. Stat. tit. 24, § 4412(2)(B). A similar change in the law took place in California between 1977 and 1983, when the legislature replaced a statute requiring merger with one authorizing local governments to adopt merger provisions if they choose. *See Morehart v. Cty. of Santa Barbara*, 872 P.2d 143, 162 (Cal. 1994).

As these examples suggest, state and local governments are constantly adjusting zoning rules, including the rules governing the merger of adjacent nonconforming lots, to respond to local conditions and local preferences. They should be allowed to continue to do so.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

WISCONSIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, THE REAL ESTATE ROUNDTABLE, NATIONAL ASSOCIATION OF REALTORS, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL APARTMENT ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL AND LEADING BUILDERS OF AMERICA IN SUPPORT OF PETITIONERS

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IDENTITY OF *AMICI*[1]

Amici are the largest and most influential real estate industry organizations in the United States, specifically:

National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

Real Estate Roundtable ("Roundtable") represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the seventeen major national real estate industry trade associations, to jointly address key national policy issues related to real estate and the overall economy. Collectively, Roundtable members hold portfolios containing over 12 billion square feet of office, retail, and industrial

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1. No counsel for a party authored this brief in whole or in part and no person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

properties valued at more than $1 trillion, over 1.5 million apartment units, and in excess of 2.5 million hotel rooms.

Building Owners and Managers Association International ("BOMA") is a federation of ninety-one U.S. associations and eighteen international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types, including 10.4 billion square feet of U.S. office space that supports 1.8 million jobs and contributes $227.6 billion to U.S. GDP. Its mission is to advance the interests of the commercial real estate industry through advocacy, influence and knowledge.

International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. The shopping center industry is essential to economic development and opportunity. It is a significant job creator, driver of GDP, and critical revenue source for the communities its members serve through the generation of sales taxes and the payment of property taxes. These taxes fund important municipal services, including firefighters, police officers, school services, and infrastructure such as roadways and parks. Shopping centers are not only fiscal engines; they are integral to the social fabric of their communities by providing a central place to congregate with friends and family, discuss community matters, and participate in and encourage philanthropic endeavors.

National Apartment Association ("NAA") is a federation of nearly 170 state and local affiliates that

encompasses over 69,000 members representing more than 8.1 million apartment homes throughout the United States and Canada. NAA is America's leading voice for the apartment housing industry, providing members with the most comprehensive range of strategic, educational, operational, networking, and advocacy resources they need to learn, to lead and to succeed.

National Association of Real Estate Investment Trusts ("NAREIT®") is the worldwide representative voice for REITs and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

National Association of REALTORS® ("NAR") is a nationwide, nonprofit professional association that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. NAR's membership includes 54 state and territorial Associations of REALTORS®, approximately 1,300 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

National Multifamily Housing Council ("NMHC") is a national nonprofit association based in Washington,

D.C., that represents the leadership of the $1.3 trillion apartment industry. Its members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 38 million Americans who live in apartments today. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and eighteen million U.S. households live in an apartment home (buildings with five or more units).

Leading Builders of America ("LBA") is a national trade association representing twenty one of the nation's largest public and private homebuilders. LBA members build approximately one-third of all new homes sold in the United States each year. LBA seeks to preserve home affordability for American families by engaging issues that affect home affordability, availability of credit, or home construction practices.

INTRODUCTION AND INTEREST OF *AMICI*

Amici are national and international real estate industry organizations whose members consist, collectively, of hundreds of thousands of firms and individuals that own, develop, manage or finance countless parcels of real property in jurisdictions across the United States. Many of those firms and individuals have substantial real estate holdings. They therefore often own or engage in transactions involving contiguous, but distinct, real estate parcels.

Amici's members regularly purchase, sell, develop, finance and otherwise deal with real property. When they engage in those transactions, these property owners and managers have a very clear understanding – from the law of real property – of the parcel, or the distinct multiple parcels, that are the subject of their purchase, sale or other transactions. Property law is clear in every jurisdiction that the lot lines that separate real property create discrete parcels.

Amici and their members have a strong interest in assuring that clear rules providing for separate treatment of distinct real property parcels also apply to the relevant parcel analysis in regulatory takings cases like this one. Indeed, given their reliance in their everyday business on state law lot lines delineating real property parcels, it is unsettling to *Amici*'s members that courts in regulatory takings cases are not at all clear about the boundaries of the real property that is relevant in such cases. Instead, courts in takings cases sometimes – like the court below in this case – treat multiple contiguous parcels of real property as if the state law lot lines separating the parcels did not exist. Courts do so even though those very same multiple contiguous parcels can still be bought, sold, and financed separately.

Aggregation of multiple contiguous parcels without regard to state law property boundaries invariably leads to negative outcomes for land owners, because the larger the scope of property to be considered, the less severe the impact of an offending regulation on the entire relevant parcel. Aggregation of distinct parcels therefore may make it virtually impossible to establish an "elimination of all economic use" taking under *Lucas v.*

South Carolina Coastal Council, 505 U.S. 1003 (1992), and even more difficult than usual to establish a taking under the alternative multi-factor analysis of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Thus, in addition to being inconsistent with bedrock real property principles and practices delineating the boundaries of separate parcels in other contexts, aggregation of distinct but contiguous parcels in takings cases is also fundamentally unfair – and discriminatory – to parties like *Amici*'s members who frequently purchase, own and develop contiguous distinct parcels.

Amici therefore urge the Court to reject the *per se* aggregation rule applied by the court below. Instead, we respectfully urge the Court to adopt a relevant parcel rule that declares – or at least strongly presumes – that the metes and bounds that define each separate parcel of real estate in other contexts define the relevant parcel in Fifth Amendment takings cases as well.

SUMMARY OF ARGUMENT

The *per se* rule applied by the court below – which aggregated distinct property parcels in a takings analysis – poses particular problems for *Amici*'s members, who typically have (or finance) large landholdings and regularly engage in real estate transactions involving multiple, often contiguous, parcels. The aggregation in regulatory takings cases of separate lots – which are legally–distinct for every other purpose – is inconsistent with the legal principles and practices delineating separate real estate parcels that *Amici's* members rely on when they purchase, sell and otherwise transact with respect to real property. It also is fundamentally unfair, and discriminatory, to

parties that own and develop multiple contiguous parcels. Under the *per se* aggregation rule, contiguous parcels that are separately owned are treated one way, but if commonly owned they are treated another way. In a regulatory takings case that difference is usually important, and sometimes decisive.

There is no reason in principle or in this Court's precedent, let alone in the property law or business practices that govern real property transactions, to pretend in this one context only that the metes and bounds defining each separate parcel of real estate do not exist. This Court should reject the *per se* aggregation rule applied by the court below and adopt the relevant parcel rule proposed by Petitioners, which respects state law property boundaries by presuming that they govern in regulatory takings cases no less than in the purchase, sale or financing of real property parcels.

ARGUMENT

In this regulatory takings case, the court below applied what amounts to a *per se* rule that separate property parcels which are contiguous and under common ownership – here, lot "E" and lot "F" – must be considered together as the relevant property in assessing the takings claim. *See* Pet. Br. at 8-10. On behalf of their members, *Amici* real estate industry organizations strongly support Petitioners' positions that:

1) the Court should reject that *per se* rule, and

2) the Court can and should clarify regulatory takings law by explaining that the relevant parcel determination is

ordinarily governed by familiar and well-established real estate law principles and practices, and thus real estate parcels that are distinct under applicable state or local law must also be deemed, or at least strongly presumed, to be separate parcels for purposes of assessing a regulatory takings claim.

I. The *Per Se* Rule Applied by the Court Below Is Contrary to the Legal Rules and Practices Delineating Separate Lots That Property Owners – Like *Amici*'s Members – Rely on Every Day in Conducting Their Businesses.

The ruling below requiring aggregation of contiguous parcels in regulatory takings cases is contrary to bedrock principles of real property law that delineate separate property parcels and treat them as separate units. *Amici*'s members understand those real property law principles and rely on them regularly when buying, selling, developing or financing real property. There is no reason to impose on these real estate industry participants – or any property owner – a contrary and counter-intuitive rule aggregating distinct but contiguous property parcels if and when they should challenge confiscatory government regulation as a taking.

A leading property law treatise states the "general rule" – "the boundary line between adjacent properties is to be determined by reference to the deeds and the intention of the parties as reflected by the description in the deeds." 4 TIFFANY REAL PROPERTY § 997 (3d ed. 2015). Moreover, "where there is no ambiguity in the descriptions they are to be taken as conclusive evidence of the intention of the parties." *Id.* In other words, clearly stated property

descriptions in deeds establish "the boundary line between adjacent properties." *Id.* All property owners routinely rely on that general rule when they buy, sell, or finance the real property parcels described in the respective deeds pertaining to those parcels.

Certainly ambiguities and disputes over property descriptions in deeds can arise, and real property also can be carved up into individual "strands" – like life estates and fractional interests. But this case involves, and *Amici* address, only individual parcels of land owned in fee simple – like the Murrs' Lots "E" and "F" – which commentators and some courts have termed "horizontal divisions of land." *See, e.g.*, John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1537 (1994). This brief uses the terms "property parcel" or "real estate parcel" as shorthand for these horizontal, fee simple interests. These parcels are the stock-in-trade of *Amici*'s members' real estate businesses.

Under recordation statutes in force in every state, when a deed is recorded, the conveyance of the parcel described in the deed – and "the boundary line between [it and] adjacent properties," *see* 4 TIFFANY REAL PROPERTY § 997 – is generally conclusive (absent fraud and the like) against those claiming a conflicting interest. *See* 5 TIFFANY REAL PROPERTY § 1262 (3d ed. 2015) ("Courts are . . . adverse to altering the substance and effect of instruments of conveyance which have been duly recorded."). *Amici*'s members rely on those state law recordation systems as well when they buy and sell real property parcels. Banks and other lenders likewise rely on the parcel descriptions and boundaries in recorded deeds, and in mortgages, to properly secure their interests. Since the

advent of state recordation laws in the early 19th Century, this Court has repeatedly recognized their validity and importance in settling disputes concerning ownership of distinct property parcels. *See, e.g., Jackson ex dem. Hart v. Lamphire*, 28 U.S. 280, 290 (1830) ("Reasons of sound policy have led to the general adoption of [such] laws . . ., and their validity cannot be questioned.").

Similarly, as far back as 1855, this Court held that property boundaries honestly determined by a public surveyor under an act of Congress should be conclusive and binding on the parties and are not to be disputed or disregarded by the courts:

> This construction of the law is altogether necessary, as great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no ground other than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do.

Haydel v. Dufresne, 58 U.S. 23, 30 (1855); *see also Russell v. Maxwell Land-Grant Co.*, 158 U.S. 253, 256 (1895) ("A survey made by the proper officers of the United States, and confirmed by the land department, is not open to challenge by any collateral attack in the courts.").

The *per se* aggregation rule applied by the court below is contrary to these venerable and foundational principles of real property law. These principles continue today to define the property parcels that are the subject

of countless real estate transactions conducted by *Amici*'s members and other property owners. Those property owners are familiar with and rely on these basic principles in conducting their business affairs, and they should not have a contrary rule thrust upon them in regulatory takings cases – at least in the absence of some very compelling reason. In most cases, there will be no reason for aggregating distinct parcels; to the contrary, and as shown below, aggregation of contiguous parcels introduces fundamental unfairness and market inefficiencies into the world of real estate commerce.

II. Aggregation of Contiguous, Commonly-Owned Real Property Parcels Is Fundamentally Unfair to Real Estate Industry Participants, Who Frequently Own Adjoining Properties.

The *per se* aggregation rule applied by the court below results in arbitrary and unequal treatment of similarly situated owners. It is axiomatic that parties have equal rights under the Constitution and under the Takings Clause in particular. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) ("A regulation or common-law rule cannot be a background principle [restricting the right to just compensation] for some owners but not for others."). Yet, under the aggregation of contiguous parcels approach to the relevant parcel issue, parties owning functionally and physically identical parcels of property will have dramatically unequal rights depending only on their holdings.

That is exactly the situation in this case, by the express terms of the county ordinance that causes the taking. That ordinance provides that a lot considered "substandard," as

is lot "E" here, may nevertheless be "allowed as [a] building site[]," but only if the lot "is in separate ownership from abutting lands." *See* Pet. Br. at 6-7 (quoting subsection (4) (a) 1. of the Ordinance in question); *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 842 (Wis. Ct. App. 2011) (same). Thus, if lot "E" were owned by anyone other than the Murrs, that owner could use the lot as a building site despite its substandard status. However, because lot "E" and abutting lot "F" are both owned by the Murrs, they are foreclosed by the ordinance from building on lot "E." Under the *per se* aggregation-of-parcels rule applied below, the Murrs are also likely foreclosed (because of the larger relevant parcel) from succeeding on a *Lucas*-based claim for the ordinance's destruction of the value of lot "E" in the Murrs' hands. *Cf. Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 425 (2011) (noting testimony of agency official that a permit denied to a developer that owned other nearby property would have been granted had the applicant been a party other than that developer), *rev'd on other grounds*, 707 F.3d 1286 (Fed. Cir. 2012).

Because *Amici*'s members frequently buy, own and develop contiguous real property parcels, under the *per se* aggregation rule, that same kind of starkly discriminatory treatment would threaten *Amici*'s members in countless situations that arise in the ordinary course of their real estate-oriented businesses. Developers and others in the real estate business frequently acquire or own multiple adjacent parcels for good and valid business reasons, and should not be penalized for those business practices if the government regulates away the value of one or more separate parcels. The owner of a single, isolated developable lot of land undoubtedly has a claim for a constitutional violation if the lot is subject to restrictions

preventing all economically beneficial use of the property. That is the holding in *Lucas*. *See* 505 U.S. at 1019. And yet, if that owner happens to own one or more contiguous unregulated lots, the constitutional right disappears. Thus, the government escapes liability for restrictions that are considered oppressive simply because an owner is more prosperous – or happens to be in a real estate-oriented business in which he regularly acquires multiple, sometimes contiguous parcels. The Court should not countenance that kind of unequal treatment of otherwise identically situated property owners. *See Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994) ("[T]he Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.").

Not every case in which courts have aggregated contiguous real estate parcels for takings purposes involves a regulatory imposition like the one here that discriminates expressly against owners of abutting parcels. But the same kind of discriminatory treatment is implicit in other cases. For example, in *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), the property owner (District Intown) was foreclosed from building on lots 2 through 9 when the city declared those parcels part of a historic landmark together with lot 1, which already contained an apartment building. The court rejected the owner's claim that the city had thereby effected a regulatory taking of lots 2 through 9, holding that for takings purposes, those parcels must be considered together with lot 1, which retained significant value that the court found to defeat the alleged taking. *See id.* at 880-82. Because the landmark designation eliminated all economic use of lots 2 through 9, the takings

claim would likely have succeeded if those lots were owned by anyone but District Intown.[2]

A property owner in District Intown's circumstance might consider selling lots 2 through 9 to an unrelated developer, but as discussed below, the availability of that option only compounds the adverse impact of the discriminatory treatment, by distorting the market for developable property. A buyer with knowledge of District Intown's predicament would surely offer a lower price, and most buyers would have requisite knowledge from readily available land records documenting the landmark designation. The situation was similar in *Multnomah Cty. v. Howell*, 496 P.2d 235 (1972), where the court held that a prohibitive zoning classification preventing beneficial use of four of nine separately platted lots was not a taking, because the ordinance "must be tested by its effect on the whole of defendant's contiguous property . . ." *See id.* at 238. Had the four distinct lots been all that the claimant owned, or had those lots been owned by a third party, the takings claim likely would have prevailed.

To allow categorical takings protection to wax or wane depending on whether one owns additional contiguous property is to sanction arbitrary government treatment, for there is no rational or fair connection between the extent of a property owner's holdings and the level of protection to which that owner is entitled. Such an

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2. In *District Intown*, the D.C. Circuit did not apply a rule as extreme as the one under review here, because in the court's view more than just common ownership united the nine parcels. 198 F.3d at 880. Still, had parcels 2 through 9 been owned by a third-party, the result would likely have been a taking of those parcels because the landmark designation precluded their beneficial use.

understanding converts federal takings law into an anti-deep pocket rule – and one that falls especially harshly on real estate industry participants like *Amici*'s members who often own multiple, contiguous parcels or must purchase such parcels to have a viable project. There is simply no basis in the law for that approach:

> We might as well say that all property owners who earn more than a certain income are not entitled to compensation under the Fifth Amendment so as to make it less expensive for government to regulate. Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part.

John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1032 (2003).

In short, even apart from the metes and bounds that define separate property parcels under otherwise applicable law, principles of equity, fairness and good policy are at war with the notion that contiguous parcels of real property should be artificially aggregated so as to defeat a constitutional right to compensation. As Professor Fee also wrote: "Why should the law declare that a landowner may not own more than one adjacent 'parcel' of land, each independently protected by the Fifth Amendment?" John E. Fee, *Of Parcels and Property in Taking Sides on Takings Issues: Public and Private Perspectives* § 5.4 (Thomas E. Roberts, ed. 2002), at 112.

There is no good reason. Conversely, treating legally distinct parcels of land as separately protected units accords both with constitutional justice, by affording property owners equal and fair treatment, and with basic principles of real property law delineating the separate lots that landowners – including *Amici*'s members – deal with regularly when they buy and sell, finance or develop real estate.

III. The *Per Se* Aggregation Rule Also Distorts, and Creates Inefficiencies, in Real Estate Markets.

Real estate owners, and those seeking to acquire real property, do not typically consider the effect of a transaction concerning one property parcel on other distinct parcels. That is no less true for real estate industry participants like *Amici*'s members who regularly buy and sell distinct real property parcels. When property owners engage in such a transaction, there is rarely a need for them to consider the legal consequences of that transaction for adjoining parcels – even if they already own those adjoining parcels, or are also seeking to acquire them. Real estate transactions proceed on a parcel-by-parcel basis, focused on the property parcel that is the subject of the transaction, as delineated in the deed for that parcel.

This is not to say that real property owners, including *Amici*'s members, are not aware of potential *practical* consequences of buying or developing one parcel on neighboring parcels. Common experience, as well as common sense, teach that placing a gas station in a residential community will lower property values, just as property values will increase if the developer places a

conservation easement on nearby parkland. But unless a property owner affirmatively creates a *legal* link between two parcels – for example, by creating an access easement across one parcel to benefit an adjacent parcel – there is nothing in real property law or the common experience of real estate industry participants to suggest that mere *ownership* of contiguous parcels can have *legal* consequences, let alone have adverse legal consequences to the common owner of the parcels.

The *per se* aggregation rule applied by the court below is a stark legal anomaly, and if adopted nationwide would have a significant practical – and negative – impact on real estate markets and transactions. Property owners would then have to consider the legal consequences of acquiring contiguous parcels. They also would understand that if they subdivide a large parcel into numerous lots and maintain ownership of those lots, the government could regulate away the value of one lot and avoid paying just compensation because the relevant parcel for takings purposes would be all the subdivided lots collectively. But if the same property owner sold each subdivided lot to a third party, the government's regulatory power would decrease because in that event, a regulation eliminating all economic use of one lot would work a *Lucas* taking.

"This is fundamentally inconsistent with the classical idea of property as a fungible entitlement." Fee, *The Takings Clause As a Comparative Right*, *supra*, at 1033-34. And it would unfairly penalize real estate market participants for investing in the most efficient manner. The *per se* aggregation rule undermines the efficient allocation of real property resources by discouraging a property owner from purchasing two separate but

contiguous developable lots, and encouraging piecemeal and inefficient transactions. The rule would reward the sophisticated developer who strategically buys properties sufficiently apart, while penalizing less savvy property owners who seek to minimize transaction and development costs by purchasing contiguous parcels. And, as shown by the District Intown example discussed previously, such a rule would distort market prices for real estate because buyers would know that owners of contiguous parcels have an added legal incentive to sell.

The law should not compel property owners to purchase property in geographic isolation just to preserve their constitutional protections against uncompensated takings. Yet, the *per se* aggregation rule would achieve exactly that result.

IV. The *Per Se* Aggregation Rule Is Inconsistent With This Court's Precedent.

There is no principle or precedent to commend a *per se* aggregation rule. Although the court below cited precedent in support of the *per se* rule it applied, *see* Pet. App. at A-9-10, citing *Zealy v. City of Waukesha*, 548 N.W.2d 528 (1996), which in turn relied on *Penn Central*, 438 U.S. at 130-31, both *Zealy* and *Penn Central* involved an entirely different factual situation. In those cases, unlike in this case, the takings claimant contended that the relevant property was something different and less than the state-law delineated property parcel. In each case, the something less was not a recognized unit of property under applicable state or local law. In *Zealy*, the claimant alleged a taking of an 8.2 acre portion of his 10.4 acre parcel. *See* 548 N.W.2d at 369-71. In *Penn Central*,

the alleged taking was of "air rights" above Grand Central Terminal. *See* 438 U.S. at 130-31.

Those cases, and others of similar ilk that this Court has considered, hold only that a takings claimant cannot "conceptually sever" a single recognized unit of property into distinct interests or portions that are not legally-recognized property interests. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (rejecting claim that building moratorium was a taking of a "temporal" interest). The key passage from *Penn Central* makes clear that the Court was simply rejecting an attempt to dis-aggregate a recognized property unit: "'Taking' jurisprudence does not divide a *single parcel* into *discrete segments* and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130 (emphasis added).

The Court in *Penn Central* did not address the issue presented in this case, which is whether distinct property parcels that are recognized under state law should be aggregated and considered as one in a regulatory takings case. Nonetheless, the ultimate holding in *Penn Central* on the parcel issue was that the relevant property for takings purposes was the entire parcel as defined by local law which was subjected to the regulatory imposition. *See id.* at 130-31 (takings inquiry focuses "on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the 'landmark site'").[3]

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3. As Petitioners point out, Pet. Br. at 17-18, the facts in *Penn Central* involved contiguous and other nearby property that Penn

The court below offered no reason in principle or policy why legally defined and separate property parcels should be considered together in assessing a regulatory takings claim. Nor have other courts. In only one decision addressing this issue have *Amici* found any rationale – other than citation to *Penn Central*'s "parcel as a whole" rubric – for requiring or presuming that distinct real property parcels should be considered together in assessing a regulatory takings claim. And the rationale provided in that one decision, *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451 (2006), is both unconvincing and wrong. The court in *Giovanella* cited "common sense" and "intuition" in support of its ruling aggregating distinct parcels. *See id.* at 458 ("Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property."); *id.* at 457 ("intuitive starting point . . . is to consider as one unit all contiguous property held by the same owner.").

The Massachusetts court's intuition is plainly incorrect as applied to the facts here: the Murrs have long treated lots "E" and "F" as separate parcels, and desire to continue treating them separately. They want to sell lot "E," and retain and upgrade their cabin on lot "F." *See* Pet. Br. at 4-5. The court's intuition is also contrary to the common practices of *Amici*'s members. Home builders and other real estate developers frequently develop one or more, but less than all, contiguous parcels, reserving other parcels for sale, or later development of the same

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Central also owned along with Grand Central Terminal. The *Lucas* footnote criticizing the New York Court of Appeals' aggregation of all those parcels in its decision in *Penn Central*, which Petitioners also cite, *id.* at 18-19, squarely supports reversal here as well as the relevant parcel rule advocated by Petitioners and *Amici*.

or a different kind (*i.e.*, commercial versus residential). Real estate owners in other contexts may lease separate contiguous parcels to different lessees, for different uses, or may finance one or more but less than all contiguous parcels. Examples like this abound in the real world of real estate commerce, and belie the Massachusetts court's assertion that "a person owns neighboring parcels of land in order to treat them as one unit of property." Instead, like the Murrs, owners of distinct but contiguous parcels very often treat them as the separate real estate parcels that they are.

V. A Strong Presumption That State Law Lot Lines Define the Relevant Takings Parcel Is Consistent With the Legal and Practical Understanding That *Amici* Have About the Boundaries That Define Real Property Parcels.

The *per se* aggregation rule is unsupported legally and problematic on several grounds practically. In contrast, a relevant parcel rule that rests on a strong presumption that state law property lines also define the relevant property in regulatory takings cases will promote legal consistency, equity among property owners and market efficiency. Petitioners have shown that such a relevant parcel rule is fully consistent with this Court's precedent, and the Court should now make that clear.

Although it is unnecessary in this case to explore the narrow circumstances that may overcome the presumption, most if not all of them will likely involve strategic behavior by landowners – or by governments – aimed at circumventing the presumptive rule. Where that occurs, the rule by definition allows the party seeking

to overcome the presumptive rule to demonstrate why it should not apply on those particular facts. But real estate industry participants like *Amici*'s members are not in the business to try to "game" government regulations or incur the risks inherent in circumventing established legal rules. They are in business to engage in *bona fide* real estate transactions that are driven overwhelmingly by market considerations, which in turn rest on the objective needs of local communities for residential and commercial development. Strategic behavior of the kind that governments have sometimes alleged in takings cases is most often imaginary, as the Federal Circuit recognized in *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015), *pet. for cert. filed*, 84 U.S.L.W. 3564 (U.S. March 22, 2016) (No. 15-1192):

> The government argues that the trial court's holding will allow speculators to purchase regulated property cheaply, apply for a development permit, and, if the permit is denied, succeed on a *Lucas* claim. We disagree. Lost Tree argues persuasively that "[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits."

Strategic behavior by property owners to evade a relevant parcel rule is likely non-existent, but surely rare enough that it provides no reason for any pause in establishing a presumption that state law property lines delineating individual parcels of real property also define the relevant property for purposes of assessing a regulatory takings claim. *Cf. Arkansas Game and Fish Comm'n*

v. United States, 133 S. Ct. 511, 521 (2012) ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. . . . We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. . . . The sky did not fall after [*United States v.*] *Causby* [328 U.S. 256 (1946)], and today's modest decision augurs no deluge of takings liability.").

CONCLUSION

The Court should reject the *per se* aggregation rule applied by the court below and adopt the relevant parcel rule that Petitioners (and *Amici*) advocate, which presumes that the lot lines that delineate separate real property parcels under applicable state or local law also define the boundaries of the relevant parcel in a regulatory takings case.

Respectfully submitted,

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No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Wisconsin Court of Appeals

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 130–31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTERESTS OF *AMICUS CURIAE*[1]

The National Trust for Historic Preservation in the United States ("National Trust" or "Trust") is a federally-chartered charitable and educational organization. The Trust was established by Congress in 1949 to further the historic preservation policies of the United States and "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest." 54 U.S.C. § 312102. The National Trust's mission is to provide leadership, education, and advocacy to protect America's diverse historic places and revitalize its communities.

The Trust works closely with hundreds of independent nonprofit preservation organizations at the state and local levels. The Attorney General, the Secretary of the Interior, and the Director of the National Gallery of Art are statutory *ex officio* members of the Trust's Board of Trustees. *Id.* § 312104(a). In turn, the Chair of the National Trust is an *ex officio* member of the Advisory Council on Historic Preservation, an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy. *Id.* § 304102(a).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution towards the preparation or submission of this brief. All parties have filed with the Court written consent to the filing of *amicus curiae* briefs in support of either party or neither party.

With some 750,000 members and supporters nationwide, the National Trust carries out a wide range of programs and activities to advance the public's interest in historic preservation. These activities include the promotion of public policies, legal tools, and tax incentives that support the preservation of America's heritage. The National Trust frequently participates, both as a party and as *amicus curiae*, in legal proceedings that involve the enforcement and application of laws that promote the preservation of historic places. Regulatory takings cases are a prime example, as takings jurisprudence can directly affect preservation efforts. Indeed, the trust participated as an *amicus* in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and numerous other takings cases in this Court.[2] The Trust brings a vital perspective to regulatory takings issues and has a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning activities and other community protections.

SUMMARY OF ARGUMENT

The Court should not disturb the balance that has prevailed in takings jurisprudence since *Penn Central*

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[2] *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001); *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003 (1992); *Yee* v. *City of Escondido*, 503 U.S. 519 (1992); *Preseault* v. *ICC*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church* v. *Cty. of L.A.*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates* v. *Yolo Cty.*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621 (1981); and *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980).

Transportation Co. v. *City of New York*, 438 U.S. 104 (1978). Thousands of local governments have enacted historic preservation ordinances in reliance on that decision and its progeny. Adopting Petitioners' position would disrupt those settled regimes, which have allowed historic preservation to thrive, and would give landowners incentives to manipulate lot lines to impact the takings analysis.

A. The preservation of America's historic sites, buildings, and neighborhoods is essential to maintaining the Nation's connection to our shared history and fostering our local and national senses of community. Historic preservation safeguards the physical manifestations of America's history, allowing us to share the spaces and environments in which the generations before us lived. Further, preservation enhances our quality of life by allowing us to live or work among buildings that are unique, distinctive, or simply beautiful. Preservation also offers environmental benefits, by conserving existing structures and resources and by using less energy than demolition and reconstruction. And it offers economic benefits, by maintaining or increasing property values, boosting investment and job creation, and driving tourist or consumer activity in historic districts.

B. Cities and towns across the country have adopted landmark preservation laws and have established historic districts. These laws, and other efforts by local, state, and national groups, have given a new lease on life to countless irreplaceable buildings over the past half-century.

C. It is vitally important for state and local governments to be able to pursue reasonable regulatory measures to ensure the preservation of historically significant buildings and places. As illustrated by this

Court's seminal decision in *Penn Central*, those efforts occasionally raise questions under the Takings Clause, if property owners contend that a historic preservation measure amounts to a regulatory taking. In *Penn Central*, this Court rejected the property owner's attempt to "divide" its property interest in Grand Central Terminal "into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. On that basis, the Court held that New York City had not committed a taking by barring the owner from building an office tower in the air space above the Terminal pursuant to the City's "comprehensive plan to preserve structures of historic or aesthetic interest." *Id.* at 132.

In the decades since *Penn Central*, historic preservation efforts have flourished across the Nation, in large part because the Court's approach in that case struck a proper "balance between local control and individual rights that has nourished preservation." J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 Fordham Envtl. L. Rev. 313, 314 (2004). To be sure, *Penn Central* left some questions unanswered—including the precise application of the parcel-as-a-whole test to contiguous, jointly owned plots of land. But the lower courts, guided by *Penn Central*, have largely reached appropriate results by considering a variety of factors in such cases, without applying the rigid rules (or near-dispositive presumptions) urged by Petitioners here. Thousands of local governments have adopted historic preservation laws, relying on *Penn Central* and the cases applying it, and local historic preservation regulations have been repeatedly upheld by the courts in response to constitutional challenges.

D. The Court should not disrupt the equilibrium that has prevailed since *Penn Central*. It should therefore reject Petitioners' attempt to treat their jointly owned, contiguous parcels of land as separate. Adopting a rule—or even a strong presumption—that each separately recorded plot of land is a discrete "parcel" for takings purposes will skew the balance struck in *Penn Central* and its progeny against efforts to protect and preserve historic places. Accepting Petitioners' position would also encourage property owners to manipulate the takings analysis by subdividing their existing property into separate parcels, artificially increasing the likelihood that a court would find a taking as a result of a regulatory land use law. Cf. *Dist. Intown Props. Ltd. P'ship* v. *Dist. of Columbia*, 198 F.3d 874 (D.C. Cir. 1999).

Although the Court need not adopt a rule that separately recorded contiguous parcels should *always* be aggregated, it should reject Petitioners' effort to upset the "pragmatic workable constitutional context for landmark preservation" that has existed for almost four decades. *See* Byrne, *supra*, at 334.

ARGUMENT

TAKINGS JURISPRUDENCE SHOULD CONTINUE TO ENCOURAGE REASONABLE LAND USE REGULATION, WHICH PROTECTS HISTORIC PROPERTIES.

Historic preservation offers significant benefits, from the communal, to the aesthetic, to the environmental, to the economic. Over the past five decades, Congress, the States, and municipalities across the Nation have recognized the value of, and encouraged, historic preservation efforts. And Takings Clause ju-

risprudence, as developed in this Court and applied in the lower courts, has permitted those efforts to flourish. The Court should not disrupt that balance. And it should not adopt the rule urged by Petitioners, which would enable property owners to manipulate the takings analysis to subvert land use regulation.

Part A explains the aims, goals, and benefits of historic preservation and how regulatory takings affect historic preservation. Part B outlines the growth of historic preservation efforts by the Federal Government and State and local governments. Part C explains how *Penn Central* conclusively settled that historic preservation advances an important public interest and set forth an appropriate test for analyzing regulatory takings challenges as they affect preservation. Part D demonstrates that Petitioners' presumption would disrupt the balance struck by *Penn Central* and disrupt historic preservation efforts and its associated benefits.

A. Historic Preservation Provides An Important Link To Our National Heritage And Offers Significant Economic And Environmental Benefits.

1. In the Takings Clause context, the most relevant aspect of historic preservation is the regulation of private land use, in particular to protect older buildings and neighborhoods. In this arena, historic preservation focuses on "keeping buildings in current use (with adequate safeguards against damaging change), ... rather than isolating them as objects of inspirational and antiquarian veneration." Nat'l Trust for Historic Pres., *With Heritage So Rich* 143 (Preservation Books 1999) (1966) (hereinafter "*Heritage*"). Consequently, the goal of most modern preser-

vation efforts is to give old buildings and places a new lease on life by providing them continued purpose.

To be worthy of protection, a building or neighborhood need not be "historically significant," in the sense that a major historical event occurred there or a famous person lived there: "the age and fame of a structure are only two among several elements, including scale, distinctiveness of design, and location, that should be considered in assessing a building's importance to the community." Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 Stan. L. Rev. 473, 491 (1981); see also *Heritage*, *supra*, at 143, 193.

This aspect of preservation is perhaps most visible in the historic districts that were established in the mid-to-late Twentieth Century. Historic districts stop "the construction of incompatible new buildings, or alterations to existing ones, that would detract from the esthetic values of an area in which a large proportion of the buildings were constructed during a significant architectural period or have important associations with the history of the community, state or nation." *Heritage*, *supra*, at 149.

2. Historic preservation activities—and particularly the state and local legislative efforts that are relevant in takings cases—offer a number of important benefits.

First, preservation serves important communal and aesthetic purposes. Most obviously, old buildings are "physical manifestations of a shared history." Sara C. Galvan, *Rehabilitating Rehab Through State Building Codes*, 115 Yale L.J. 1744, 1749 (2006) (arguing that older buildings are a public good). Whether that history is our national history, our local history, or

our personal history, old buildings maintain our links to it. Indeed, old places create a sense of continuity that contributes to a sense of balance and stability; they embody our civic, state, and national sense of identity; they anchor individual memories and connect us with our heritage; they offer a first-hand view into our history; inspire creativity and entrepreneurship; and they create a shared sense of community. Thompson Mayes, *Introduction: Why Do Old Places Matter?*, 29 Forum J. 7, 8 (2015); see *Penn Cent.*, 438 U.S. at 108 (noting the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all").

Old buildings also are often more human-scaled and made with more natural materials than is modern construction, and their designs reflect the usage patterns (and the daily lives) of the generations before us. As this Court has aptly observed, "[n]ot only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today." *Penn Cent.*, 438 U.S. at 108.

Second, historic preservation offers environmental benefits. See Nat'l Trust for Historic Pres., Pres. Green Lab, *The Greenest Building: Quantifying the Environmental Value of Building Reuse* vii–xi, 61 (2011) (hereinafter "*Greenest Building*") ("[T]he renovation and reuse of existing buildings of comparable functionality and size, and equivalent energy efficiency levels, consistently yield fewer environmental impacts than demolition and new construction ...."). By definition, preserving an existing structure is a conservationist act, because it "prevents the demolition and waste of existing construction materials" used to build the original structure. See David A. Lewis,

Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy, 22 N.Y.U. Envtl. L.J. 274, 290 (2015). In the same way, preservation "avoids destroying the 'embodied energy' of existing buildings"—that is, "the total of all energy necessary to construct an existing building (including the energy expended to create the building materials), which is lost when a building is destroyed rather than preserved." *Id.* at 290 & n.41; *Greenest Building*, *supra*, at 20. Further, preserving old buildings "capitalizes on traditional energy-efficient building materials and techniques." Lewis, *supra*, at 290 n.43 ("traditional building methods and styles are often environmentally superior and frequently should be revived because [they] account for local environmental issues, use local materials, and avoid wasting resources"). Finally, "[p]reservation also takes advantage of historic structures often being located in existing urban, walkable areas and not in far-flung, sprawling, auto-dependent 'greenfields.'" *Id.* at 290–91; see *Greenest Building*, *supra*, at 91.

Third, historic preservation offers concrete economic benefits:

> Designating a landmark or district as historical typically maintains if not boosts the value of the property, and as an economic development tool, historic preservation has proved its worth. Nearly any way the effects are measured, be they direct or indirect, historic preservation tends to yield significant benefits to the economy.

Randall Mason, *Economics and Historic Preservation: a Guide and Review of the Literature* executive summary (Sept. 2005); see generally Nat'l Trust for Historic Pres., Pres. Green Lab, *Older, Smaller, Better: Measuring how the character of buildings and blocks*

influences urban vitality (May 2014) ("hereinafter "*Older, Smaller, Better*"); Donovan D. Rypkema, *The Economics of Historic Preservation: A Community Leader's Guide* (3d ed. 2014); Donovan R. Rypkema & Caroline Cheong, *Measuring Economic Impacts of Historic Preservation* (2d ed. 2013).

To begin with, the "economics literature clearly comes down in favor of a positive effect of historic districting on property values." Mason, *supra*, at 7. Indeed, numerous studies have "demonstrated that local preservation measures provided an economic stimulus through increased property values." Hunter S. Edwards, *The Guide for Future Preservation in Historic Districts Using A Creative Approach: Charleston, South Carolina's Contextual Approach to Historic Preservation*, 20 U. Fla. J.L. & Pub. Pol'y 221, 224 (2009). For example, a study in New York City "found evidence of a statistically significant price premium associated with inclusion [of a property] in an historic district. The extent of the premium varied from year to year, ranging from 22.6% ... to 71.8%." Mason, *supra*, at 7 (alteration and omission in original). Likewise, a different study found a positive effect on property values in seven of nine Texas cities' historic districts (the other two were inconclusive), "increas[ing] property values in the range of 5–20 percent." *Id.*

The benefits of preservation go well beyond individual properties, however. Scholars have conducted a "significant number" of economic impact studies seeking to determine "what effect investment in historic preservation activity has on the economy of a particular region"—in other words, "'Does preservation pay[]' on more than a project-by-project basis"? *Id.* And "the answer to this question is a resounding

'yes'—historic preservation yields significant benefits to the economy." *Id.*; see also *id.* at 8–10 (collecting studies establishing "the overwhelmingly positive economic impacts that have been reported for historic preservation").

These "[o]ther economic benefits of local preservation ordinances include the protection of historic property owners' investments in these properties through an ordinance's maintenance of the community, the 'fiscal benefits' of reusing existing infrastructure, and an increase in tourism dollars spent within the community." Edwards, *supra*, at 224–25 (footnotes omitted); see also Megan M. Carpenter, *Preserving A Place for the Past in Our Future: A Survey of Historic Preservation in West Virginia*, 100 W. Va. L. Rev. 423, 432–33 (1997) (describing similar studies); Galvan, *supra*, at 1754 (noting the "economic benefits from the tourists [preservation] attracts, social benefits from a more heterogeneous population seeking a broader range of living environments, and cultural benefits from its enhanced setting of artistic activity.").

Many of the economic benefits of preservation can be seen in the National Trust's own Main Street America program, a national network of over 2,000 historic downtowns and neighborhood commercial districts.[3] Main Street America "aims to revitalize communities through the rehabilitation and adaptive reuse of older structures." Galvan, *supra*, at 1753. "Program data consistently report positive economic impacts in their communities." Mason, *supra*, at 10.

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[3] Main Street Am., *Welcome to Main Street America*, http://www.preservationnation.org/main-street/ (last visited June 15, 2016).

Indeed, between the early 1980s and 2005, Main Street America produced $17 billion in public and private reinvestment, averaging $9.5 million per community; a net gain of 57,470 businesses; a net gain of 231,682 jobs; and a total of 93,734 buildings rehabilitated. *Id.*; see also Galvan, *supra*, at 1753–54 & n.38 (reporting even higher figures from the National Trust's subsequent annual report). "All in all, the 'reinvestment ratio' (average number of dollars generated in a community per dollar used to operate the local Main Street program) is documented as $40.35 for every $1 spent." Mason, *supra*, at 10.[4]

In short, historic preservation offers a bounty of significant cultural, aesthetic, environmental, and economic benefits.

B. Local Governments, The States, And Congress Have Recognized The Value Of Historic Preservation.

Until the mid-Twentieth Century, formal historic preservation efforts in the United States were minimal, and focused largely on property already owned by the federal government.[5] See Antiquities Act of

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[4] Tax credits are yet another form of economically productive preservation measure. *See* Nat'l Park Serv., *Federal Tax Incentives for Rehabilitating Historic Buildings: Annual Report for Fiscal Year 2015*, at 1 (Mar. 2016), https://www.nps.gov/tps/tax-incentives/taxdocs/tax-incentives-2015annual.pdf (reporting over 41,250 completed projects since the Federal Historic Preservation Tax Incentives Program's inception in 1976, generating over $78 billion in the rehabilitation of income-producing historic properties).

[5] There were some exceptions, including sporadic preservation efforts undertaken by private groups—most notably, the preservation of Mount Vernon by the Mount Vernon Ladies' Associa-

1906, ch. 3060, §§ 1–2, 34 Stat. 225, 225 (prohibiting unauthorized removal or destruction of "any historic or prehistoric ruin or monument, or any object of antiquity" from, and authorizing the President to declare national monuments on, government land); Oscar S. Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law & Contemp. Probs. 314, 314–15 (1971). Over time, these programs expanded to allow the government to acquire historic and archaeological sites it did not already own, but "they did little to protect privately-owned properties from destruction in cases where the owners or governmental authorities desired to put the subjacent lands to other uses." Gray, *supra*, at 314. In fact, these laws did not even "restrain such destruction by the United States government itself." *Id.* at 315.

That changed with the passage of the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (NHPA or Act). In the Act, Congress declared that "the spirit and direction of the Nation are founded upon and reflected in its historic past," and that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development." *Id.* at 915. In particular, Congress expressed concern that, "in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation." *Id.* Thus, Congress deemed it "necessary and appropriate" to "give maximum en-

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tion in 1852, after both the federal and Virginia governments declined to purchase the estate. *Heritage*, *supra*, at 132.

couragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities." *Id.*[6]

Congress's concerns were prompted by the Nation's unprecedented post-World War II growth, which saw the demolition of many historic structures. The development of the interstate highway system, suburban sprawl, and the proliferation of urban renewal programs in the 1950s and 1960s all contributed to the rapid destruction of historic buildings and even entire neighborhoods. See *Heritage*, *supra*, at 11; Rose, *supra*, at 475 ("During the 1950s, federal, state, and local governments embarked on urban renewal and highway projects that chewed up aging neighborhoods and distinctive old buildings ....").

Many of these issues were brought to the fore by *With Heritage So Rich*, a book released by the Special Committee on Historic Preservation of the U.S. Con-

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[6] This statement was updated in 2014. It now declares the government's policy to: "foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations"; "provide leadership in the preservation of the historic property"; "administer federally owned, administered, or controlled historic property in a spirit of stewardship"; "contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means"; "encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment"; and "assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust" with their preservation activities. 54 U.S.C. § 300101.

ference of Mayors and the National Trust in early 1966. The book vividly illustrated the variety and beauty of America's culturally valuable buildings and places—and the rate at which they were being demolished. As Lady Bird Johnson wrote in the foreword, "almost half of the twelve thousand structures" in the National Park Service's Historic American Buildings Survey had "already been destroyed." *Heritage*, *supra*, at 17; see *id.* at 115–21. *Heritage* closed by recommending a "comprehensive national plan of action." *Id.* at 194.

Most of the measures recommended in *Heritage* were adopted in the NHPA later in 1966. In all, the Act "represented an unprecedented codification of the government's commitment—expressed in law and eventually backed up with procedures and regulations—to historic preservation as a matter of federal policy." *Id.* at 7.

Today, all fifty States participate in preservation efforts under the NHPA, such as by nominating properties for inclusion in the National Register of Historic Places or consulting with federal agencies, and many have their own preservation laws as well, often patterned after the Act. See 3 Patricia E. Salkin, *American Law of Zoning* § 27:5 (5th ed. 2016); Nat'l Trust for Historic Pres., *State Historic Preservation Acts*, http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/state-law/historic-preservation-acts.html (last visited June 14, 2016).

As awareness of historic preservation's importance was growing at the national and state level, local governments began to take action as well. "Starting with Beacon Hill in Boston in the early 1950s, the interest in creating historic districts and landmarks

commissions grew steadily in all parts of the country." *Heritage*, *supra*, at 10. That interest was further spurred by the 1965 demolition of New York City's Beaux-Arts-style Penn Station, built in 1910—"a building unmatched in grandeur by any in the country," *id.* at 114. Penn Station's demolition was a significant factor in the adoption of the New York City landmark law whose application was upheld by this Court in *Penn Central*. Now, "[l]ocal historic commissions and the regulations that they oversee often comprise the most important level of government in historic preservation law." 3 Salkin, *supra*, § 27:5; see *id.* § 27:6 (describing local preservation programs); see also *Penn Cent.*, 438 U.S. at 107 & n.1 (noting that, by 1978, over 500 municipalities had "enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance").

Some municipal preservation laws permit the designation of specific buildings as landmarks, some focus on the creation of historic districts encompassing multiple buildings or even entire neighborhoods, and many (like New York City's) do both. See, *e.g.*, N.Y.C. Admin. Code § 25-301 *et seq.* Such laws typically include restrictions on alteration, construction, or demolition that are designed to preserve the building's, or district's, historic character, *e.g.*, *id.* § 25-305, along with procedures to permit changes that are appropriate for the building or necessary for safety or financial reasons, *e.g.*, *id.* §§ 25-306 to -312. Overall, local preservation laws "demonstrate[] the effectiveness of ... municipal program[s] that involve[] cooperation and support from both state governments and the Federal Government." Frank B. Gilbert, *Landmarks and City Hall: How Historic Preservation Contributes to Municipal Government*, 11 J. Nat. Resources &

Envtl. L. 211, 227 (1996) (lauding local preservation programs' "educational features," "the accountability to the public," and "the involvement of concerned citizens").

This Court recognized the fundamental legitimacy of these laws in *Berman* v. *Parker*, 348 U.S. 26 (1954), which rejected a constitutional challenge to the condemnation of a commercial building by the District of Columbia Redevelopment Land Agency. See *id.* at 28–29. The plaintiff argued that "develop[ing] a better balanced, more attractive community" in a blighted area was not a valid public use. *Id.* at 31. The Court disagreed, explaining that the "concept of the public welfare is broad and inclusive, and the "values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33. *Berman*'s holding "is basic to the present wide acceptance of the preservation of historic districts by architectural control as a legitimate function of government." *Heritage*, *supra*, at 149.[7]

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[7] *See also City of Santa Fe* v. *Gamble-Skogmo, Inc.*, 389 P.2d 13, 18 (N.M. 1964) (citing *Berman* and holding that regulation of architecture in Santa Fe's historic area was permissible); *Opinion of the Justices to the Senate*, 128 N.E.2d 557, 562 (Mass. 1955) (same, as to creation of historic districts in Nantucket); *Maher* v. *City of New Orleans*, 371 F. Supp. 653, 661 (E.D. La. 1974) (collecting cases "sustain[ing] the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts ... are concerned"), *aff'd*, 516 F.2d 1051 (5th Cir. 1975).

C. *Penn Central* Reaffirmed The Legitimacy Of Historic Preservation And Struck A Successful Balance Between Regulation And Property Rights.

1. The conclusion that historic preservation laws are permissible exercises of the police power, however, does not resolve whether the application of such a law in a particular case constitutes a taking. That was the question presented in *Penn Central*. There, Penn Central Transportation Co., which owned Grand Central Terminal—"a magnificent example of the French beaux-arts style" and "an ingenious engineering solution to the problems presented by urban railroad stations"—sought to build a fifty-plus-story office tower in the air space atop the Terminal building. See 438 U.S. at 115–17. However, the Terminal had been designated as a landmark under New York City's landmark law. *Id.* at 115–16. The City's landmark commission denied Penn Central's proposals, explaining:

> The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.

Id. at 118. Penn Central then filed suit, alleging an uncompensated taking. *Id.* at 119.

This Court rejected the claim. It began by reviewing the development of historic preservation laws, explaining that "[t]hese nationwide legislative efforts have been precipitated by two concerns": First, "large

numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways." *Id.* at 107–08 (footnotes omitted). Second, there is "a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all." *Id.* at 108. Thus, "[h]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people." *Id.* The Court then explained that New York's landmark law "is typical of many urban landmark laws in that its primary method of achieving its goals is ... by involving public entities in land-use decisions affecting [historic] properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users." *Id.* at 109–10, 110–13 (detailing the operation of the law).

The Court next explained that its analysis of whether a government regulation required compensation under the Fifth Amendment was necessarily a case-by-case one, but "several factors ... have particular significance," including "the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action." *Id.* at 124. Turning to the merits of Penn Central's claim, the Court noted that it had "recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city," *id.* at 129 (collecting cases), and observed that there was no dispute that Penn Central was "capable of earning a

reasonable return" from the Terminal regardless of the landmark law's restrictions, *id.*

Penn Central nevertheless contended that the landmark commission's denial constituted a taking because it "deprived [the company] of any gainful use of the[] 'air rights' above the Terminal." *Id.* at 130. The Court disagreed:

> [T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. ... *"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.* In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*—here, the city tax block designated as the "landmark site."

Id. at 130–31 (emphases added). Because the permit denial restricted only the development of the air space above the Terminal, and not the use of the Terminal itself, it did not result in a taking.

Finally, the Court dispensed with Penn Central's argument that the landmark law "effect[ed] a 'taking' because its operation has significantly diminished the value of the Terminal site." *Id.* at 131. Prior cases had rejecting takings claims premised on mere "diminution[s] in property value," and the Court was unpersuaded by Penn Central's effort to distinguish those cases on the ground that landmark laws (unlike

zoning or historic-district legislation) "apply only to selected parcels" and are "inevitably arbitrary or at least subjective." *Id.* at 131–33. The Court pointed out that the landmark law was neither discriminatory nor arbitrary; instead, it "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city." *Id.* at 132. And the Court concluded that the landmark law's restrictions were not sufficiently severe to require compensation, because they "not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.* at 136–38.

2. By reaffirming that "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city," *id.* at 129, "*Penn Central* settled conclusively that historic preservation advances ... an important public interest and thus fall[s] within the police power," Byrne, *supra*, at 317. And the Court's flexible, fact-specific analysis, focused on the impact of government regulations on the "parcel as a whole," 438 U.S. at 131, has permitted historic preservation ordinances like New York City's landmark law to thrive. "*Penn Central* was understood at all times to be a crucial constitutional test for historic landmark protection laws and for historic preservation as land regulation more generally," and thus the Court's decision "constituted a great victory for historic preservation." Byrne, *supra*, at 314–15. Most importantly, "it provided courts a basic approach to regulatory takings claims," which has allowed "historic preservation law [to] come of age in many cities, providing a strong and pervasive regula-

tory system for knitting together existing buildings and new development." *Id.* at 315.[8]

Penn Central has not only produced a doctrinal environment that has well-served preservation efforts, but also crafted the incentives for the drafters of historic preservation laws and the regulators who enforce them. In reliance on the Court's approach in *Penn Central* (and the subsequent cases applying it), cities and towns have structured their preservation laws "to find a compromise that preserves the essentials of a historic resource while permitting adaptation for a remunerative use." *Id.* at 330. Under these regimes, "developers interested in developing landmarks have an incentive to propose developments that have some chance of approval," whereas municipalities "have an incentive to approve responsible proposals, because doing so enhances the political acceptability of preservation review, eases opposition to expansion of the system from additional designations, and allows the municipality to avoid costly and embarrassing takings losses." *Id.* at 333. "Historic preservation law has matured under these conditions to provide significant control over design and scale for much urban development." *Id.* at 334.

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[8] That is true not only because the Court set the federal constitutional standard, but also because *Penn Central* has proven highly influential in state courts' interpretations of their own constitutions. Byrne, *supra*, at 315; *e.g.*, *United Artists Theater Circuit, Inc.* v. *City of Phila.*, 635 A.2d 612, 619 (Pa. 1993) (noting *Penn Central*'s "widespread acceptance" among state high courts as a reason to follow its analysis).

D. Petitioners' Rule Would Disrupt The Post-*Penn Central* Balance And Enable Property Owners To Manipulate The Takings Analysis.

1. The Court should not disrupt the balance that has prevailed in takings jurisprudence since *Penn Central*. That balance has permitted historic preservation efforts to thrive while ensuring compensation to landowners where such measures go too far. To be sure, *Penn Central* (and other decisions applying it) left certain questions unanswered, including the "denominator" question in the "parcel as a whole" inquiry. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987); *Dunes W. Golf Club, LLC* v. *Town of Mount Pleasant*, 737 S.E.2d 601, 614–15 (S.C. 2013). But, even in the absence of guidance from this Court on that question, many lower courts have maintained the appropriate balance struck in *Penn Central* by resolving the "denominator" issue with "a flexible approach, designed to account for factual nuances." *Forest Props., Inc.* v. *United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); see also *Dist. Intown Props.*, 198 F.3d at 880 (considering "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot"); *Ciampitti* v. *United States*, 22 Cl. Ct. 310, 318–19 (1991) (similar); *LaSalle Nat'l Bank* v. *City of Highland Park*, 799 N.E.2d 781, 793 (Ill. App. Ct. 2003), *as modified on denial of reh'g* (Oct. 31, 2003) (similar).[9]

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[9] Although the approach applied in these cases differs from Respondent Wisconsin's proposed rule, which focuses on a landowner's objectively reasonable expectations, see Br. for Respondent State of Wisconsin 27–37, the Trust believes that the

These courts attempt to "identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment," *Giovanella* v. *Conservation Comm'n of Ashland*, 857 N.E.2d 451, 457 (Mass. 2006) (quoting *Ciampitti*, 22 Cl. Ct. at 318–19), in accord with *Penn Central*'s admonition that the broader takings analysis involves "essentially ad hoc, factual inquiries," 438 U.S. at 124. This Court should likewise decline to adopt a categorical rule (or an effectively categorical presumption) that would disrupt the existing balance and depart from the Court's prior focus on "the interest in 'fairness and justice.'" *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (applying "the familiar *Penn Central* approach" because a "new categorical rule" would be "too blunt an instrument"); see also *Dunes W. Golf Club*, 737 S.E.2d at 616–17 (noting this Court's practice of "eschewing a 'set formula' for determining when compensation is due" and suggesting that this "flexibility [could] extend[] to the process of determining the relevant parcel"). This approach not only would be consistent with the Court's analysis in prior regulatory takings cases, but also would recognize that cities, towns, and states have drafted their historic preservation laws in reliance on the current doctrinal environment. See *supra* pp. 21–23. Disrupting that *status quo* by adopting a categorical rule of the sort the Court has previously

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two approaches will often lead to similar results, as the factors considered by the lower courts in these cases will also impact whether a certain expected use is objectively reasonable, cf. *id.* at 43–47. In this inquiry, it is the Trust's view that state law, while surely relevant, is not dispositive of the federal constitutional question. The point for present purposes, however, is that the Court should not disrupt settled expectations by departing too far from the prevailing approach.

avoided, see *Tahoe-Sierra Pres. Council*, 535 U.S. at 342, could upend settled expectations in unpredictable ways.

2. Adopting a rigid rule (or a strong presumption), as urged by Petitioners, would also permit landowners to manipulate the takings analysis. The D.C. Circuit's decision in *District Intown Properties*, 198 F.3d 874, aptly illustrates the importance of the "parcel as a whole" question in this regard. *District Intown* involved an apartment complex across Connecticut Avenue from the National Zoo. *Id.* at 876. The apartment building was originally built in 1922,[10] with a large landscaped lawn between the building and Connecticut Avenue. For several decades, the entire property occupied one undivided parcel. In 1998, however, the property owner, District Intown, subdivided the property into nine contiguous lots: one for the apartment building, and eight parcels that divided the lawn into roughly even slices. *Id.* at 877. The company planned to build a row of townhouses on the eight lawn parcels, see *id.*, destroying the landscape and blocking portions of the historic building from view. At the same time, however, local residents petitioned to designate the entire property as a historic landmark under the District of Columbia's historic preservation laws. *Id.*; see D.C. Code § 6-1101 *et seq.* The petition was granted, and the District denied construction permits for the townhouses, explaining that "'any construction destroying the lawn' would be incompatible with its landmark status." 198 F.3d at 878.

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[10] S. Cathedral Mansions, *History*, http://www.southcathedralmansions.com/history/ (last visited June 15, 2016).

District Intown sued the District, claiming an uncompensated taking. *Id.* at 876. The district court and the court of appeals both held that no taking had occurred. The court of appeals recognized that, as in this case, "[t]he definition of the relevant parcel profoundly influences the outcome of a takings analysis." *Id.* at 880. There, the (ultimately dispositive) question was whether "the relevant parcel consist[ed] of the property as a whole"—including the apartment building—or each of "the eight lots for which construction permits were denied." *Id.* at 879. After considering a number of factors, including that all of the lots were "spatially and functionally contiguous," the court held that the relevant parcel was the property as a whole. *Id.* at 880–82. On that basis, the court found that no taking had occurred, because the parcel as a whole was not rendered valueless (as required by *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003 (1992)) and the owner could not show a sufficient intrusion on its economic interests and reasonable investment-backed expectations (under *Penn Central*'s *ad hoc* test).

District Intown illustrates the risks posed by Petitioners' position. If the Court were to adopt an iron-clad rule—or even just a strong presumption, see Petitioners' Br. 24–29—that the takings denominator is each separately recorded "parcel," a landowner in District Intown's position would be able to manipulate the takings analysis by subdividing existing lots in an effort to ensure that the portions of their property subject to historic preservation laws or other land use restrictions are "completely taken," requiring compensation. Cf. *Giovanella*, 857 N.E.2d at 459 (a flexible approach properly "minimizes the significance of lot lines in defining the boundaries of the denominator").

CONCLUSION

Since *Penn Central*, takings jurisprudence has struck an appropriate balance between individual property rights and the historic preservation policies of state and local governments. The Court should decline Petitioners' attempt to disrupt this balance with a categorical rule (or presumption) that contiguously owned parcels are always analyzed separately for takings purposes.

Respectfully submitted,

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In the Supreme Court of the United States

JOSEPH P. MURR, *et al.*,
Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,
Respondents.

On Writ of Certiorari to the Court of Appeals of Wisconsin

BRIEF OF THE STATES OF NEVADA, ALASKA, ARIZONA, ARKANSAS, KANSAS, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130–31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTEREST OF *AMICI CURIAE*

Nevada and other *Amici* States "enjoy[] a rich history of protecting private property owners against government takings." *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1127 (Nev. 2006). Indeed, the first right memorialized by Nevada's Founders in the State's Declaration of Rights "is the protection of a landowner's inalienable rights to acquire, possess and protect private property." *Id.* at 1126 (citing NEV. CONST. art. I, § 1).

Consistent with Nevada's longstanding tradition, the State—acting through its Attorney General—is authorized by its citizens to commence, join, or participate in any suit necessary "to protect and secure the interest of the State ...." NEV. REV. STAT. § 228.170.

Amici States' interest is at its apex here. The interpretation of the "parcel as a whole" rule adopted by the Court of Appeals of Wisconsin not only imperils the property rights of citizens *vis-à-vis* the States, but also endangers the property rights of the States as against the federal government.

SUMMARY OF ARGUMENT

At the time of the Founding, the dominant view was that property rights are not merely creations of the state, but natural rights that the state has a duty to protect. *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 41–43 (3d ed. 2008) (describing how property rights were "undoubtedly a paramount value for the framers of the Constitution"). At the Constitutional Convention in 1787, Alexander Hamilton stated that "one great obj[ect] of Gov[ernment] is the personal protection and security of property." MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (1937).

To help ensure that the newly established government would not trample upon property rights, the Founders adopted the Fifth Amendment to the United States Constitution, which provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This Court has long recognized that excessive regulation of private property can unjustly burden landowners just as much as physical occupation or

condemnation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Court of Appeals of Wisconsin and some other courts, (Pet. Cert. 17–19; Opp'n Cert. 21–22), have construed the "parcel as a whole" rule as requiring aggregation of separate, but contiguous, parcels under common ownership when assessing whether a regulatory taking has occurred.

This expansive interpretation of the "parcel as a whole" rule is at odds with the text and original meaning of the Takings Clause, and has no basis in this Court's precedents. It also creates significant perverse incentives for both landowners and regulators.

If allowed to stand, it would undermine the interests of state governments in multiple ways. It would leave their property vulnerable to large-scale uncompensated encroachment by the federal government. It is also likely to undermine the effectiveness of their land-use regulation policies. If regulators do not have to pay compensation to affected property owners in cases where the latter happen to possess contiguous lots, they will often have little incentive to fully consider the costs and benefits of proposed regulations, and prioritize those with the greatest likely beneficial impact.

Since before the Founding, individual parcels of land have served as the fundamental unit of American property law and have been at the heart of the enforcement of property rights. This Court has often acknowledged the central role that individual parcels play when deciding takings and just compensation cases. And for good reason. Parcels delineate the

tangible boundaries within which property rights exist and the physical space to which regulations extend. Aggregating contiguous parcels under common ownership into a single super-parcel will undermine traditional notions of property rights, have deleterious economic consequences, and encourage the undisciplined regulation of individuals' and states' property.

ARGUMENT

I. Aggregating Separate Parcels for Takings Analysis Has No Basis in Text, History, or Precedent.

A. The Wisconsin Rule Goes Against the Text and Original Meaning of the Takings Clause.

The text of the Takings Clause is simple. It forbids the "taking" of "private property" without "just compensation." U.S. CONST. amend. V. Nothing in the text indicates that the requirement of just compensation might be waived if the owner of the property at issue also happens to own other property nearby. What matters is whether property has been "taken," not whether the owner still has the use of the lot next door. Any other approach makes a hash of the text, and diverts the regulatory takings analysis from the actual effect of the regulatory action on the actual piece of property at issue, to focusing on the identity of the landowner and other property he or she may happen to own.

The original understanding of the Takings Clause fully accords with the text on this crucial issue. The Founders were committed to a natural law

interpretation of property rights and the Takings Clause, under which regulatory restrictions on the use and control of property qualify as compensable takings—except in unusual circumstances where the regulations prevented common-law nuisances or other similar threats to public health and safety. *See* Eric Claeys, *Takings, Regulations, and Natural Property Rights,* 88 CORNELL L. REV. 1549, 1561–65 (2003) (describing the Founding-era view); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUPREME COURT REVIEW 39, 40–41 (same). As James Madison, the "father of the Constitution" who also went on to author the Takings Clause, put it, "Government is instituted to protect property of every sort." James Madison, *Property* (1792), *in* THE FOUNDERS' CONSTITUTION 1:598 (Philip Kurland & Ralph Lerner eds., Univ. Chicago Press 1987).[1]

There is no reason to think that the Founding generation believed that the natural property rights protected by the Takings Clause could somehow be overridden or abridged in cases where the owner also has another lot adjacent to the one being taken. To the contrary, such an arbitrary limitation on property rights would severely undermine the purpose of the just compensation requirement of the Takings Clause: preventing the government from seizing property without paying for it.

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[1] On Madison's key role in drafting and enacting the Takings Clause, *see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 77–78 (1998).

B. The Wisconsin Rule Goes Against Historical Practice and Early Court Decisions.

Unsurprisingly, there is little if any historical foundation for treating contiguous parcels under common ownership as a single super-parcel for takings purposes. Indeed, even when limited to a single parcel analyzed alone, the "parcel as a whole" rule has little historical grounding. *See* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel As A Whole*, 36 VT. L. REV. 549, 549–50 (2012) (discussing the "parcel as a whole" rule and arguing that it lacks foundation in traditional property law). As a leading academic defender of the rule has recognized, the "parcel as a whole" rule "is an invention of the United States Supreme Court." David A. Dana, *Why Do We Have the Parcel-as-a-Whole Rule?*, 39 VT. L. REV. 617, 624 (2015); *cf.* William W. Wade, Penn Central's *Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 278 (1999) ("The parcel-as-a-whole notion became a bedrock takings precedent with no precedent, justification, or empirical underpinnings."). That alone should give the Court pause before reflexively extending such an ahistorical principle into new territory.

The Anglo-American system of property law has been built upon the rule of treating separate parcels separately.[2] "A land parcel, in contrast to an

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[2] *See* James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT'L & COMP. L. 757, 758 (2011) ("A fundamental characteristic of real property law, one that is definitional in nature, is that its subject matter consists of land

ownership interest such as a fee simple estate, is not an abstraction. Each land parcel has a physical reality, and virtually all land parcels abut other parcels. Each parcel has one particular location, defined by its proximity to other pieces of property." Smith, *supra* note 2, at 758 (footnote omitted). Generally, metes and bounds set the perimeter of a parcel and delineate the physical boundary between the landowner's rights and the rights of others, including the government. *See id.* at 765; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32 (2002).

It is a basic truism of real estate law that every plot of land is different. This is one of the reasons why a breach of contract for the sale of land requires a remedy of specific performance, whereas most other breaches of contract require only money damages. "Land is intrinsically non-substitutable, as compared to $100 notes or shares or grains of rice. Each plot of land will have its own specific attributes, which mean that the plot is not, and can never be identical with another plot, even if it is part of a ... development where all the [tracts] are similar." KATY BARNETT, ACCOUNTING FOR PROFIT FOR BREACH OF CONTRACT: THEORY AND PRACTICE 90 (2012).

The separateness of parcels is an inescapable principle in early American case law. From early on, courts emphasized the significance of separate parcels in eminent domain and condemnation proceedings.

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parcels"); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("[T]he 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law ....").

The Supreme Court of Minnesota's early ruling in *Wilcox v. St. Paul & N. P. Railway Co.*, 29 N.W. 148 (Minn. 1886), is instructive. There, with the municipality's blessing, a railway company entered upon the street adjacent to two lots (lots 1 and 10) owned by Wilcox and constructed a railroad. *Id.* at 149. Wilcox sued and claimed damages for the two disturbed lots as well as eight other undisturbed lots (lots 2 through 9) comprising the rest of the block. *Id.*

Acknowledging that the right to compensation "exists only in respect to the tract or parcel of land a part of which is taken," the Minnesota Supreme Court held "in respect to city property, in fact unoccupied, but which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or blocks, intended for use as such, and not as one entire tract." *Id.* at 149–50. Mere continuity of the parcels was not enough to treat them as one large tract. *Id.* at 149. The court reasoned that the parcels were presumptively separate, and that presumption could only be overcome by demonstrating that the several parcels were put to the same use. *Id.* at 149–50.

Nineteenth and early twentieth century court decisions found that "the weight of authority supports the Minnesota view, which seems to be, in substance, that regularly platted, unoccupied lots are presumed to be, until shown to the contrary, separate tracts, and must be dealt with as such in eminent domain proceedings." *In re Queen Anne Boulevard*, 137 P. 435, 442 (Wash. 1913); *see also Evansville & R.R. Co. v. Charlton*, 33 N.E. 129, 131–32 (Ind. App. 1893) (rejecting rule that owner of "several different lots ...

[having] no connection therewith, except in so far as they are contiguous to the lots which do abut on the street, ... is entitled to recover damages for the depreciation in value of" the merely contiguous lots); *Or. R. & Nav. Co. v. Taffe*, 134 P. 1024, 1028 (Or. 1913) ("It is held that the subdivision of land into lots makes every lot prima facie a separate and distinct tract, and, if the owner claims damages to all or more than the lot taken, he must produce evidence to overcome this presumption."); *N.Y. Mun. Ry. Corp. v. Weber*, 166 N.Y.S. 542, 545 (N.Y. App. Div. 1917), *modified on other grounds*, 123 N.E. 68 (1919) ("Where land not devoted to any special use had been divided into blocks and lots upon a map by the owner of a plot ... the property should prima facie be treated as lots and blocks in ascertaining damage, and not as an entire tract ....").

C. The Wisconsin Rule Goes Against this Court's Precedents.

1. *Sharp v. United States*

A survey of the legal landscape reveals that this Court's case law reflects the early state court decisions and the historical practice of presumptively respecting the separate division of parcels. In *Sharp v. United States*, 191 U.S. 341, 341–42 (1903), the federal government initiated a condemnation action against one of Sharp's three farms, known respectively as the "Gibbons," the "Dunham," and the "White" farms. The target of the action, the Gibbons farm, consisted of 41.75 acres purchased in 1891. *Id.* at 352. The Dunham and White farms were each 80 acres and purchased in 1880 and 1899, respectively. *Id.*

This Court noted that the three contiguous tracts came under common ownership "by three separate titles at three distinct times ...." *Id.* Even though adjoined, the "tracts of land were absolutely separate and independent farms, having no necessary relation with each other, and the farming on each had been conducted separately, and each farm had its own house and outbuildings." *Id.* at 353.

Despite their distinctiveness, Sharp sought to recover condemnation damages to the Dunham and White farms as a result of the government's taking of the Gibbons farm. *Id.* at 350–51. This Court rejected Sharp's effort. Adopting the reasoning of the court of appeals, this Court explained that, while it may sometimes be difficult to identify "what is a distinct and independent tract," courts analyzing the scope of a taking should focus on "the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner ...." *Id.* at 354. This Court concluded that Sharp was only entitled to damages by virtue of his ownership of the Gibbons farm because it was "the tract invaded .... His ownership of other lands [was] without legal significance." *Id.* at 355.

Tract "integrity," and whether there has been an "invasion," can only be evaluated with reference to the metes and bounds that establish the physical borders of a single parcel. Identifying the "parcel as a whole" is equivalent to determining the "distinct and independent tract" from which a part is taken. And this Court instructed that the "distinct and independent tract" is to be assessed without reference

to "other parcels or holdings of the same owner ...." *Id.* at 354.

The *Sharp* Court provided multiple examples to illuminate the principle. "If A own a single house in a block in a city and the government proposes to take it, is it liable to the owner of the house adjoining for a depreciation in its value by reason of the taking of the house of A for the purposes proposed?" *Id.* at 355. This Court answered negatively because, under the Constitution, no portion of the conjoining property was taken. *Id.* at 355–56. Likewise,

> If again, the government seek to take the property of A, consisting of a single house in a city, and he has also acquired, through a separate title and at a different time, houses adjoining, would the government be liable to A for the damage sustained by that other property on account of the use the government proposes to make of the property taken? Or again, if A purchase a block of vacant lots in a city from one source and at one time and erect a row of buildings thereon, and one building the government seeks to take, would the government be liable for the damages sustained by the other houses by reason of the uses to which it would put the building taken?

Id. at 356.

The Court cited *Lincoln v. Commonwealth*, 41 N.E. 489 (Mass. 1895) and *Wellington v. Boston & M.R.R.*, 41 N.E. 652 (Mass. 1895) as sources of possible answers to these questions. *Sharp*, 191 U.S. at 356.

Lincoln held "[t]he lot from which a part is taken is considered as one whole ...." 41 N.E. at 491. Thus, divided parcels of land, even if contiguous, are regarded as distinct unless they are used as one for practical purposes. *Id.* at 492. *Wellington* agreed that parcels will be treated as separate and distinct when they are actually divided by (amongst other things) "recorded paper lines" and there is no evidence that they are used together or held out for sale as one parcel. 41 N.E. at 652.

There is no legitimate reason to treat differently the aggregation of parcels for purposes of computing just compensation from the aggregation of parcels for purposes of identifying a taking in the first instance. Indeed, the Wisconsin Court of Appeals offered none. Pet. App. A-11–12. There is no historical or equitable basis to place the burden on a landowner to rebut the presumption of parcel distinctiveness to obtain compensation (*Sharp* and *Wilcox*) without placing the same burden on the regulator to avoid a taking and the payment of just compensation.

2. *Penn Central*

Sharp's emphasis on the need to identify the appropriate parcel was not directly cited in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Yet the borders of Penn Central's "parcel" were a crucial implicit factor in the Court's application of the newly announced "parcel as a whole" rule. The Court described the Grand Central Terminal property as being bounded to the north by the Pan-American Building, to the east by the Commodore Hotel, to the west by Vanderbilt Avenue, and to the South by 42nd Street. *Id.* at 115. Notably, Penn

Central owned the neighboring Commodore Hotel and Pan-American Building. *Id.*

Throughout the opinion, the word "parcel" was coextensive with the entire terminal as described. *See, e.g., id.* at 129 ("They accept for present purposes both that *the parcel of land* occupied by Grand Central Terminal must, in its present state ....") (emphasis added); *id.* ("They also do not dispute that the restrictions imposed on *its parcel* are appropriate means ....") (emphasis added); *id.* at 130 ("irrespective of the value of the remainder of *their parcel*, the city has 'taken' their right to this superadjacent airspace") (emphasis added); *id.* at 135 ("the Landmarks Law neither exploits *appellants' parcel* for city purposes nor arises from any entrepreneurial operations .... [it] permit[s] appellants to use the remainder of *the parcel* in a gainful fashion") (emphases added); *id.* at 136 (describing "use of the parcel" "as a railroad terminal containing office space and concessions").

Superficially, the Court may have appeared to give the "parcel as a whole" a wider definition. It stated that the "parcel as a whole" consisted of "the city tax block designated as the 'landmark site.'" *Id.* at 130–31. But the definition of "landmark site" under the applicable ordinance was akin to the test historically used in the *Sharp* and *Wilcox* cases. The ordinance provided that a "landmark site" was "[a]n improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof *used as and constituting part of the premises* on which the landmark is situated ...." *Id.* at 111 n.10 (emphasis added). In other words, the ordinance (like this historical practice) would allow aggregation of

contiguous parcels for one "landmark site" if they were put to the same use.[3]

There was no suggestion in *Penn Central* that the Commodore Hotel or the Pan-American Building were, or should have been, aggregated in the takings analysis simply because they were contiguous parcels under common ownership.[4] *Penn Central* does not support the proposition, adopted by the Wisconsin Court of Appeals, that "contiguousness is the key factor" or that there is "a well-established rule that contiguous property under common ownership is considered as a

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[3] The D.C. Circuit adopted a similar interpretation of *Penn Central*, when it ruled that "[a]bove all, the parcel should be functionally coherent. In other words, *more should unite the property than common ownership by the claimant.*" *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (emphasis added).

[4] Concurring in part and concurring in the judgment in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747–49 (1997), Justice Scalia addressed the claim that Penn Central's ability to transfer development rights to its other properties was considered on the takings side of the equation under the auspices of assessing the "the impact of the regulation." He expressed skepticism that the separate parcels were actually aggregated. *See id.* at 749 ("The relevant land, *it could be said*, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole had not been diminished.") (emphasis added). But that was the only plausible explanation to avoid overruling that portion of *Penn Central*. *Id.* Justice Scalia was not "supporting" the aggregation of parcels. *Contra* Opp'n Cert. 18–19. In his opinion for the Court in *Lucas*, Justice Scalia characterized *Penn Central*'s framework as extreme and unsupportable. 505 U.S. at 1016 n.7. To the extent *Penn Central* did aggregate contiguous parcels or condone aggregation without a finding of fully unified usage, it should be overruled.

whole regardless of the number of parcels contained therein." Pet. App. A-11.

Penn Central did note that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130 (internal quotation marks omitted). But this Court did not hold the opposite. It did not condone the aggregation of discrete parcels into a single segment to determine whether rights have been entirely abrogated.

Penn Central did not repudiate the longstanding rule that contiguous parcels are considered separately unless it is shown that they are put to a common use. The Court ruled that no taking occurred because Penn Central could still extract beneficial use from the landmark site terminal parcel despite the loss of the superadjacent airspace, *not* because Penn Central could still extract beneficial use from *other* adjacent properties. *Id.* at 136–38.

3. *Keystone Bituminous Coal Ass'n v. DeBenedictis*

The separate consideration of individual parcels continued in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), where the Court denied a facial challenge to Pennsylvania's Subsidence Act, in part because there was no evidence of a taking with respect to distinct and identifiable parcels or coalmines. This Court emphasized that "petitioners have not even pointed to *a single mine* that can no longer be mined for profit." *Id.* at 496 (emphasis added).

Instead, petitioners claimed a taking of 27 million tons of coal spread out over 13 different mines operated by various companies. *Id.* Petitioners "never claimed that their mining operations, or *even any specific mines*, have been unprofitable since the Subsidence Act was passed." *Id.* (emphasis added). There was no evidence that "any specific location" was unprofitable. *Id.* "The 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Id.* at 498.

This Court distinguished *Keystone* from *Mahon* on the grounds that Justice Holmes' mention of "certain coal" in *Mahon* referred to evidence in the record that six identifiable collieries in the City of Scranton were inoperable due to the regulation. *Id.* at 498–99. In contrast, the *Keystone* Court determined that there was no basis to treat only the coal affected by the regulations "as a separate parcel of property." *Id.* at 498.

Keystone confirms that takings must be analyzed within the context of "single," "specific," "separate segments of property"—*i.e.* individual parcels of land.

4. *Lucas v. South Carolina Coastal Council*

This Court in *Lucas* specifically declined to resolve the apparent uncertainty surrounding the property interest against which a taking is measured. But even so, it did reaffirm the importance of the background principles of American property law. *See* 505 U.S. at 1016, 1026–29 & nn.7, 15. Relying on tradition and original understanding, Justice Scalia correctly hypothesized that the answer to the takings

denominator conundrum might reside in how states "accord[] legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* at 1016 n.7.

Justice Scalia's prediction stemmed from "the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Id.* at 1028. Parcel title was the centerpiece of that culture. "[O]ur 'takings' jurisprudence ... has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire *when they obtain title to property*." *Id.* at 1027 (emphasis added). An inquiry must be made into the nature of the property owner's estate to ascertain the interests inherent in the property "title to begin with." *Id.* The Court did not need to delve into additional nuances because there was no serious debate that Lucas's two beachfront parcels held in fee simple were interests in land "with a rich tradition of protection at common law ...." *Id.* at 1016 n.7, 1020.

Lucas also resolves whether aggregation of parcels pursuant to "merger" laws has any constitutional significance for takings purposes. It does not. *Lucas* pronounced that newly enacted legislation or decrees cannot prohibit all economically beneficial use of land without compensation; any such limitation "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

Lucas therefore reinforces that background principles of property law must be taken into account for takings purposes. And there is a longstanding history of protecting the property rights associated with the title to individual—not aggregated—parcels.

5. *Palazzolo v. Rhode Island*

After *Lucas*, *Palazzolo v. Rhode Island* reinforced the rule that a subsequent merger ordinance cannot evade a taking by attempting to alter the boundaries of a parcel, which are a fundamental part of the title. *See* 533 U.S. 606, 626–30 (2001) (affirming that the Constitution protects common law property rights, and that states cannot strip an owner of constitutional protections through positive enactments). And to the extent there was any doubt whether a landowner's acquisition of property after enactment of a merger ordinance changed the analysis, *Palazzolo* answered that question in the negative. *See id.* at 627–28 (post-enactment transfer of title does not absolve a taking).

In *Palazzolo*, this Court once again recognized the confusion (and the Court's discomfort) surrounding the interpretation of the "parcel as a whole" in the denominator of the takings fraction. *Id.* at 631. And again, the Court did not definitively resolve the controversy. But it did emphasize that the government could not usurp traditional common law rights without paying compensation, even if the statute authorizing such regulation was enacted after the owner acquired the parcel in question. *Id.* at 627–30.

After the landowner in *Palazzolo* subdivided his three adjoining parcels into separate lots and sold some of them, he asserted that a wetlands regulation

effectuated a taking over the entirety of all of the parcels. *Id.* at 613–14, 631–32. Because it was undisputed that one of the parcels retained $200,000 in development value, the Court agreed that no taking occurred. *Id.* at 631–32. The Court refused the landowner's belated attempt to treat the value-retaining parcel separately from the other parcels because he himself had initially chosen to litigate the case as if they were a single unit. *Id.* at 631–32 ("Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails."). The Court hinted at a different outcome if the landowner had appropriately litigated each parcel separately. *See id.* at 631–32.

6. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*

Finally, the Court addressed a sort of converse of parcel aggregation—temporal parcel disaggregation—in *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 331. In that case, the Court rejected a *per se* takings claim stemming from two moratoria that precluded development for two years and eight months, respectively. *Id.* at 306–07, 341–42. The Court indicated that a *per se* taking could not be established by "conceptually severing" the 32-month time period that development was prohibited from each landowners' fee simple estate to assert that the moratoria were actionable takings during the time

period in which development was forbidden. *Id.* at 318, 330–31.

Importantly, the Court held "[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest." *Id.* at 331–32 (citing RESTATEMENT OF PROPERTY §§ 7–9 (1936)). Consequently, this Court concluded that there is a taking of the "parcel as a whole" when the landowner is deprived of the entire area defined by the metes and bounds. *See id.* at 332 ("Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole' ....").

The Court postulated that some of the landowners might have been able to prove a taking had they "challenged the application of the moratoria to their *individual parcels*, instead of making a facial challenge ...." *Id.* at 334 (emphasis added). Thus, *Tahoe-Sierra* is a strong reminder that individual parcels are considered as the "parcel as a whole" for takings purposes.

* * *

This Court's precedents from *Sharp* through *Tahoe-Sierra* demonstrate that the individual parcel has been the basic unit of both American property law and this Court's Fifth Amendment analysis. Not a single one of these decisions—or any other decision of this Court—requires or even permits the aggregation of individual contiguous parcels simply based upon common ownership when identifying the property interest against which a regulation is measured.

This Court should not follow the Wisconsin Court of Appeals in cavalierly bulldozing the boundaries that have long been established by the parceling system. Parcels are the physical and tangible embodiment of the property rights of individuals and states. A weakening of individual property rights under the cloak of the "parcel as a whole" will inevitably erode the rights the Fifth Amendment was enacted to protect.

II. Aggregating Separate Parcels for Takings Purposes Creates Perverse Incentives and Inhibits Socially Beneficial Use of Property Rights.

In addition to history and precedent, there are substantial economic and practical reasons to reject the categorical aggregation of multiple contiguous parcels under common ownership into a unified "parcel as a whole." The application of the "parcel as whole" rule should be strictly limited to minimize the dangers it creates. *Cf.* William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 ENVTL. L. REP. NEWS & ANALYSIS 10936, 10938 (2011) ("*Penn Central*'s sensible 'parcel-as-a-whole' language has created a quagmire of economic confusion.").

This Court has sensibly considered economic implications in cases involving the "parcel as a whole" rule. *See, e.g., Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 339–42. Specifically, the Court has analyzed whether a rule would "foster[] inefficient and ill-conceived growth," "create a perverse system of incentives," or serve to disadvantage particular landowners or interest groups. *Id.* at 339–42; *see also Lucas*, 505 U.S. at 1019 n.8 ("[O]ur prior takings cases

evince an abiding concern for the productive use of, and economic investment in, land ....”). Aggregating commonly owned contiguous parcels together as part of a unitary “parcel as a whole” goes against these economic considerations.

Blanket aggregation of contiguous parcels with overlapping ownership fosters inefficient and ill-conceived growth. Society benefits from efficient, cooperative use of contiguous parcels. *See* Eagle, *supra*, at 551. Often, joint exploitation of contiguous parcels creates economic value that could not be realized if each were utilized separately. But a broad interpretation of the “parcel as a whole” rule “punishes the very cooperation that engenders social value.” *Id.* It creates a variety of dangerous perverse incentives.

For example, to avoid the risk of uncompensated takings, prospective land purchasers may forego assembling large holdings that could otherwise be put to more productive use. Alternatively, careful buyers will structure purchases of contiguous parcels so that each parcel is owned by a different individual or entity. The forced use of multiple ownership configurations will increase transaction costs and hinder the productive use of land. In some cases, excessive division of property rights can seriously inhibit beneficial land assembly. *See generally* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STIFLES INNOVATION, AND COSTS LIVES (2010). Alternatively, potential developers might decide not to purchase contiguous property at all. This too could easily inhibit productive development.

The private sector has a variety of effective mechanisms for overcoming potential "holdout" problems that inhibit effective land assembly. *See* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 90–99 (2015) (describing and analyzing several such strategies). But they require flexible property rights, and the ability to freely purchase separate tracts in order to make them part of a common project. *Id.* "Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part." Eagle, *supra*, at 564.

In addition to inhibiting beneficial assembly projects, the aggregation of parcels for takings purposes creates a perverse incentive to divide property when it is inefficient to do so. Again, landowners may excessively divide their parcels into separate ownership structures to limit exposure to governmental takings. The subdivision of land for the purpose of avoiding uncompensated takings creates potentially serious economic inefficiencies. In some cases, land that might be more effectively managed under a single common owner might be divided into multiple lots with different owners, so as to ensure that each would get compensation in the event of a regulatory imposition by the state.

Such perverse incentives can arise even under a more sensible, narrower interpretation of the "parcel as a whole" rule. The only way to completely eliminate them would be to either abolish the rule or give

government a virtual blank check to take property without compensation. But the risk is greatly exacerbated if the "parcel as a whole" rule is expanded to include all contiguous parcels under common ownership. That is likely to lead to far more assembly problems and inefficient division of property than a rule limited to individual parcels, as traditionally understood.

By contrast, the risk of harmful strategic behavior is minimized if the Court enforces the traditional approach of considering each parcel separately. At the very least, there should be a strong presumption against any aggregation, satisfiable, if at all, only in cases where the two lots are fully integrated with each other, and used for essentially the same purpose. *See Sharp*, 191 U.S. at 353–55; *St. Paul & N. P. Ry. Co.*, 29 N.W. at 149–50; *cf. Dist. Intown Props. Ltd. P'ship*, 198 F.3d at 880 (lots must be "functionally coherent" and "more should unite the property than common ownership by the claimant").

Lastly, aggregating contiguous parcels disadvantages certain types of landowners, particularly small businesses. Small businesses often suffer disproportionate burdens from governmental regulation,[5] and it is not unusual for them to own

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[5] Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. PA. J. BUS. L. 837, 838 (2011) ("Small businesses continue to suffer disproportionately from the cost of regulations."); Joseph A. Castelluccio III, *Sarbanes-Oxley and Small Business: Section 404 and the Case for A Small Business Exemption*, 71 BROOK. L. REV. 429, 444 (2005) ("In the case of small businesses, the relative costs of compliance with federal regulations can be disproportionately high, both in terms of dollars and manpower.").

contiguous parcels for complementary, but different, uses. For example, it is common for a restaurant or a store to use one lot as a place of business, and a contiguous lot for parking, or as a storage facility. The broad interpretation of the "parcel as a whole" advanced by the Wisconsin Court of Appeals will have a disparate effect on small businesses, more often regulating them out of beneficial use of certain parcels while, on the whole, denying that compensation is required.

III. Aggregating Separate Parcels for a Takings Analysis Harms *Amici* States.

States are both regulators and property owners. Approving the aggregation of contiguous parcels based upon nothing more than common ownership threatens the States' property, which—like the property of individual citizens—is subject to a growing thicket of federal regulations. States face the same risks from the federal government that citizens face from their own states. If states—like the federal government—can avoid effectuating a taking by aggregating parcels without regard for common usage, state and local legislators or bureaucrats may be tempted to adopt undisciplined and unfocused regulations to the detriment of landowners and society.

A. Expanding the "Parcel as a Whole" Rule Would Dangerously Increase the Federal Government's Power to Seize the Property of the States Without Compensation.

As originally understood at the Founding, the federal government did not have the power to take

property within the States. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1741 (2013). Its eminent domain power was thought to be limited to the District of Columbia and federal territories. *Id.* at 1742.

Notwithstanding this original understanding, the federal government has exercised the power to take state property since this Court in 1875 ruled that such authority is inherent in our constitutional system. *See Kohl v. United States*, 91 U.S. 367 (1875). The rise of the modern regulatory state has increased the frequency of such federal intrusion onto state property. *See, e.g., Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2013) (addressing a situation where the federal government may have taken large quantities of state-owned land by repeatedly flooding it).

In the event of an intergovernmental taking, the Fifth Amendment requires the federal government to pay just compensation to the States in the same manner that compensation must be paid to private citizens. *United States v. Carmack*, 329 U.S. 230, 242 (1946) ("when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it"); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("the same principles of just compensation presumptively apply to both private and public condemnees").

Endorsing the Wisconsin Court of Appeals's broad interpretation of the "parcel as a whole" rule will expand the federal government's regulatory control over state land and limit the circumstances in which

just compensation might be paid. States often own thousands of acres of contiguous parcels and the federal government could avoid a taking simply by aggregating large swaths of a state as part of the takings denominator. Under such a calculation, few if any federal regulations of state property—regardless how onerous—would be ruled compensable takings.

This is particularly troubling in western states where the federal government owns large tracts of land, and often seeks to restrict contiguous property owned by the States. In Nevada, for example, the federal Bureau of Land Management already controls approximately 47.5 million acres, or about sixty-three percent of Nevada's total land area.[6] Taken to its logical extreme, the federal government could enact a federal regulation, under some pretense, that barred all or most development on all property owned by Nevada in Lincoln County. The federal government could argue that this regulation did not constitute a taking because, when all contiguous state-owned parcels in Clark, White Pine, and Nye Counties are aggregated, Nevada would still retain some beneficial use of its state land.

If the federal government can so easily avoid paying just compensation, it will be able to wield its powerful regulatory authority with even greater force to coerce and punish resisting states. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 861–62

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[6] U.S. Department of the Interior, Bureau of Land Management, Nevada (last visited April 2016), *available at* http://www.blm.gov/nv/st/en.html.

(1989). The requirement of just compensation serves as a check on the federal government's taking power. *Id.* at 861–62. Diluting that check by condoning the aggregation of state-owned parcels would give the federal government expansive power to seize control of state-owned land, without paying compensation.

B. Aggregating Commonly Owned Contiguous Parcels Would Negatively Affect State Regulatory Policies.

Reducing the circumstances in which the States and the federal government must pay just compensation will lead to worse regulatory policies at all levels of government. "Forcing governments to internalize the costs that their regulations impose on landowners, will strengthen incentives to adopt only those regulations whose benefits are likely to exceed their costs." Ilya Somin, *Two Steps Forward For the "Poor Relation" of Constitutional Law:* Koontz, Arkansas Game & Fish, *and the Future of the Takings Clause*, 2012–13 Cato Sup. Ct. Rev. 215, 234 (hereinafter Somin, "*Two Steps Forward*"). Requiring compensation imposes tighter discipline on regulatory efforts and incentivizes officials to focus regulatory efforts on those policies that produce the greatest benefits relative to their potential costs. *Id.*

This Court's previous decisions requiring compensation for land-use exactions have had precisely the kind of beneficial disciplining effect that economic theory predicts. A 2001 analysis of a survey of land-use planners in California found that 74 percent of California city planners and 81 percent of county planners agreed with the statement that "'[t]he nexus and rough proportionality standards established by the

[Supreme Court's] *Nollan* and *Dolan* decisions, when followed carefully, simply amount to good land use planning practice.'" Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions,* 35 U.C. DAVIS L. REV. 103, 142 (2001) (quoting appendix).[7] This positive response to the decisions may have arisen because planners support their tendency "to favor a comprehensive, long-range approach to planning that avoids ad hoc decision-making" and incentivizes careful consideration of relevant tradeoffs. *Id.*

Such regulatory discipline is particularly important in the field of environmental regulation, where state and local governments often face difficult tradeoffs where it is essential to carefully weigh competing interests and fully consider relevant costs and benefits. *See* Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Regulatory Takings*, 49 B.C. L. REV. 301 (2008); James W. Ely, Jr., *Property Rights and Environmental Regulation: The Case for Compensation*, 28 HARV. J.L. & PUB. POL'Y 51 (2004).

Should the "parcel as a whole" rule be expanded to include contiguous parcels under common ownership, government officials will often have little reason to worry about paying compensation, and will therefore have incentives to ignore the harm caused by their regulations, except perhaps in situations where the

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[7] The study analyzed the effects of this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

victims have great political clout. Somin, *Two Steps Forward*, at 223. Society does not benefit when governments are indifferent to the costs of the regulations they enact. *Id.*

Far from inhibiting beneficial regulation, confining the "parcel as a whole" rule to individual parcels can actually enhance its efficiency.

CONCLUSION

Based upon the foregoing, *Amici* States respectfully request that this Court reverse the lower court's ruling.

Respectfully submitted,

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RECORD AND 1 BRIEF

No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIS COUNTY,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF WISCONSIN

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS ON THE MERITS

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INTEREST OF AMICUS CURIAE[1]

New England Legal Foundation ("NELF") is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its members and supporters include large and small businesses, law firms, individuals, and others, located primarily in New England. They believe in NELF's mission of defending individual economic rights and the rights of private property, protecting the free-enterprise system, and promoting balanced economic growth in New England and the nation as a whole. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases of interest and concern to NELF's members and supporters.

NELF believes that the rights of private property are not second-class constitutional rights. The immense expansion of regulatory law that has taken place over the past nine decades at all levels of government has adversely affected the exercise of those rights, however. Since its founding, NELF has staunchly supported property owners in their efforts to vindicate their Fifth Amendment rights against government encroachment. *See, e.g., Marvin M.*

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than Amicus, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3(a), Amicus also states that Respondents St. Crois County and the State of Wisconsin have filed written consents to the filing of amicus briefs in support of either or neither party, docketed March 21 and March 22, respectively. Petitioners have filed a similar consent, docketed April 6.

Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

NELF appears as an amicus in the present case because it believes that the case offers the Court an ideal opportunity to clarify a crucial part of its analysis of regulatory takings claims, and because NELF believes its views may assist the Court in arriving at a fair and just outcome. The concept of "the parcel as a whole," first announced by this Court 38 years ago, is long overdue for clarification and, above all, limitation. As the Petition illustrates, federal and state courts entertain widely divergent views about what "the parcel as a whole" concept means in practice. This lack of consensus has engendered considerable confusion in the minds of all concerned, leading some courts to expand the meaning of the "parcel as a whole" on the most tenuous grounds, thereby virtually ensuring the defeat of takings claims. This Court's rejection of the parcel as a whole rule stated in the Question Presented would be a welcome first step in putting regulatory takings jurisprudence on a fairer and surer footing.

SUMMARY OF THE ARGUMENT

Fairness and justice are the touchstones of this Court's takings jurisprudence; but they are eroded when courts excessively aggregate parcels into a supposed parcel as a whole, causing claimants to go uncompensated. It is this risk of complete undercompensation, rather than of any overcompensation, that most needs to be addressed by the Court in order to enhance the fairness and justice of takings law. In this case, the Court has an ideal opportunity to give lower courts much needed guidance on this vexed issue.

The two-factor aggregation rule applied by the Wisconsin appellate court has no basis in *Penn Central*; it is exactly the kind of overly inclusive rule that leads courts to aggregate parcels excessively. The inadequacy of the rule is shown by its failure to include unity of use as a factor, even though the latter is a much more reliable indicator of the owner's own pre-taking view of relevantly related parcels and is highly pertinent to the owner's investment-backed expectations. Moreover, in the closely related area of eminent domain law, where it is also necessary to decide whether discrete parcels should be treated as one tract for purposes of determining a compensable taking, the general view is that unity of use, not contiguity, is the preponderant factor that should be considered. Thus the rule at issue, which does not include unity of use as a factor, should be rejected as not in keeping with *Penn Central* and its progeny.

ARGUMENT

I. The Court Should Strike A Fair And Just Balance When Identifying The Denominator Of The Takings Fraction.

This Court has affirmed that "fairness and justice" are the guiding principles of its takings jurisprudence. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong*); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (same).

In *Penn Central*, the Court acknowledged that, in cases of regulatory takings, "fairness and justice" must be achieved by ad hoc factual inquiries.

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," . . . this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong*); *id.* at 124 (Court conducts "essentially ad hoc, factual inquiries"). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (because "concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate," Court has "eschewed" any set formula for determining when just compensation is owed).

Nowhere are the "fairness and justice" of this ad hoc analysis more put in question than in the uncertainty revolving around the use of the "parcel as a whole" as the denominator in the so-called takings fraction.

The Court has long been aware of the crucial role played by the economic comparison represented by the takings fraction.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the

> value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)).

Beginning at least with *Penn Central*, the Court has been alert to the problem of *overcompensation* that might result if, as Penn Central advocated in that case, the effect of the regulation were measured by "divid[ing] a single parcel into discrete segments and attempt[ing] to determine whether rights in a particular segment have been entirely abrogated" by the regulation in question. *Penn Central*, 438 U.S. at 130. The Court obviously understood that if compensation were to be paid under such a standard, "[g]overnment hardly could go on," as Justice Holmes famously said. *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393, 413 (1922). *See also* John E. Fee, *The Takings Clause as a Comparative Right*, 76 So. Cal. L. Rev. 1003, 1032 (2008) ("[T]he takings denominator issue seems to exist solely because we have not found a better way to avoid the extreme result of requiring the government to compensate for all changes in the law."); David A. Dana, *Why Do We Have the Parcel-as-a-Whole Rule?*, 39 Vt. L. Rev. 617, 620 n.19 (2015).

As the present case illustrates, however, it is rather the other extreme—that of excessively

aggregating parcels and *undercompensating* claimants—that has so far escaped the Court's scrutiny and most threatens the principles of fairness and justice underlying the Court's takings jurisprudence.

Various scholars have identified the unfairness inherent in defining the parcel as a whole in a manner that is so inclusive that it prejudices the rights of the claimant. Professor Steven J. Eagle of George Mason School of Law, one of the foremost scholars of regulatory takings, has written:

> By identifying the right that is taken with the limitation the government imposes by regulation, there will always be a complete taking. However, the same objections could be made, *mutatis mutandis*, from the landowner's perspective. Through what I have termed "conceptual agglomeration," disparate parcels would be argued to constitute the relevant parcel, for the purpose of minimizing the owner's loss.

Property Tests, Due Process and Regulatory Takings Jurisprudence, 2007 BYU L. Rev. 899, 940-41 (2007). *See also* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 Vt. L. Rev. 549, 562 (2012).

In a similar tenor, another prominent scholar of takings law, Professor John E. Fee of Brigham Young University's J. Reuben Clark Law School, has observed, "The need for such a limitation [on an owner's ability to sever property rights into increasingly smaller units] is fully evident; what scholars often overlook, however, is

that any test must also prevent the state from defining the parcel as broadly as it wishes." *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1550 (1994). Professor Fee worries that "the denominator problem . . . seems to indicate that the more property a person owns, the less likely he or she is to be compensated for an equivalent regulatory loss." *Takings Clause as a Comparative Right*, *supra* p. 5, at 1006.

Three decades ago, the tendency of courts to unduly expand the parcel as a whole was named by one commentator "a deep pocket rule" because "holders of extensive property must suffer a greater diminution in value in order to establish a takings claim." Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 So. Cal. L. Rev. 561, 568 (1984). In other words, such owners will generally go uncompensated because they are, in effect, judged able to bear alone the costs of public benefits, a result utterly inconsistent with the principles of "fairness and justice" stated in *Armstrong* and reaffirmed subsequently several times by this Court.[2] *See supra* p. 3. "We might as well say," declares Professor Fee, "that all property owners who earn more than a certain income are not

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[2] Long before *Armstrong*, the Court said of the right to compensation that "it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

entitled to compensation under the Fifth Amendment so as to make it less expensive for government to regulate." *Takings Clause as a Comparative Right*, *supra* p. 5, at 1032.

This case therefore affords the Court an invaluable opportunity to clarify for lower courts *Penn Central's* use of the parcel as a whole concept, so that they may better achieve fair and just outcomes in regulatory takings cases.

II. The Court Should Reject The Categorical Rule Stated In The Question Presented.[3]

If the Court is to rebalance the scales, as Amicus urges it to do, it should reject the categorical rule contained in the Question Presented. That narrow, two-factor rule is overly inclusive and lacks a foundation in *Penn Central*, as Petitioners rightly argue. *See* Petitioners' Brief on the Merits at 16-19. The rule tends to aggregate separate parcels into a larger parcel as a whole on far too tenuous a basis to be consistent with fairness and justice, and thereby creates a serious risk of undercompensation.

Within the confines of the present case, this point may be best illustrated by comparing the rule's limited, two-factor analysis with a consideration of

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[3] Petitioners ask the Court to confirm that analysis of an alleged regulatory taking starts with a rebuttable presumption that the denominator of the takings fraction is the fee title of the individual parcel alleged to have been taken. *See* Petitioners' Brief on the Merits at 24-26. NELF joins its voice to that of Petitioners in that request. The argument Amicus sets out below is intended to demonstrate, by contrast, the inadequacy of the two-factor test employed by the Wisconsin courts.

unity of use, the factor of whose importance the Murrs sought to persuade the Wisconsin courts, unfortunately with no success.

As shown in part by the takings fraction itself, *see supra* p. 4, it is on economic injuries that regulatory takings analysis focuses. *See also Penn Central*, 438 U.S. at 124 (no set formula for determining when "economic injuries" are to be compensated; factors of "particular significance" in court's inquiry are "economic impact" and "interference with distinct investment-backed expectations"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). *Cf. Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1116-17 (Fed. Cir. 2015) (to leave residual, non-economic value insufficient to avoid *Lucas* taking).

Unity of use rightly recognizes the owner to be the starting point for any investigation into an economic nexus between parcels. As Frank I. Michelman suggested in the 1967 article cited in *Penn Central*, the owner's use of a parcel demonstrates the owner's own pre-taking belief about relevant property interests. *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1232-33 (1967). In addition, whether parcels owned in common are also united by use will likely say a lot about the owner's investment-backed expectations, a crucial part of a *Penn Central* analysis. *See Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1292-93 (Fed. Cir. 2013).

In contrast, mere common ownership and contiguity, the sole factors found in the purported rule applied below, are inadequate in themselves to

establish in a reliable way whether there exists a relevant use uniting separate parcels into a meaningful economic whole. We need not look any further than the present case in order to see the truth of that observation. It is undisputed that the two lots in question here were, from the start, purchased with entirely different economic uses in mind. Lot F was bought in 1960 for the Murr family's own residential use; in accordance with this intended use, a three-bedroom recreational cabin was soon thereafter built there. Three years later, Lot E, a vacant, undeveloped lot situated adjacent to Lot F, was purchased by the Murrs' parents solely for investment purposes; true to that purpose, through all the intervening years it has been kept vacant and undeveloped, in sharp contrast to the Murrs' own neighboring Lot F. Thus, the two lots have been bought, retained, and managed with entirely separate and independent economic uses in mind. A decision to aggregate them in a takings analysis solely because of their common ownership and contiguity would rest on nothing meaningful in their respective economic uses—they plainly do not function as a single economic unit nor were ever intended to do so.

Another way to convey the artificially and unfairly constrained nature of the two-factor rule is by examining a closely related area of law—eminent domain. In the law of eminent domain, unity of use is a well-established factor in the analysis of certain claims for compensation. Such claims arise when there has been a condemnation of one property and there exists a question as to whether another property, not itself physically taken, has suffered a compensable diminution of economic value as a

consequence of the condemnation. The general rule is that a claimant is entitled to just compensation for the condemned property and also for any diminution of value suffered by the other property as a result of the taking, but only if there is unity of use between the two properties such that they form one economic unit. *See* James Timothy Payne, Annotation, *Eminent Domain: Unity or Contiguity of Separate Properties Sufficient to Allow Damages for Diminished Value of Parcel Remaining After Taking of Other Parcel*, 59 A.L.R. 4th 308 § 2[a] (1988).

> As a general rule, in order to establish that lands divided in some manner are in fact a single unit for the purpose of assessment of damages due upon the condemnation of all or a portion of the land on one side of the divide, so that severance or consequential damages can be awarded for the land not actually [i.e., directly] affected by the condemnation, the party claiming that the land is a unit, whether it be the property owner or the condemnor, must show contiguity, unity of use, and unity of ownership.[4]

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[4] Amicus notes that this allocation of the burden of persuasion in eminent domain law corresponds to that suggested by Petitioners for regulatory takings cases. *See* Petitioners' Brief on the Merits at 26 (party wishing court to depart from presumed parcel as a whole either by aggregating with it other parcels or by segmenting it should bear burden of persuasion). In both situations, it is only fair and reasonable to impose that burden on the party asking the court to ignore legal distinctions that have hitherto rendered a given parcel a discrete, integral unit.

. . . .

> Although the general rule is that the land must be contiguous and there must be a unity of use between the various parcels, it becomes difficult to separate or distinguish these two issues, many courts holding lands contiguous because of a unity of use between the parcels. But more often than not, cases of this nature turn on the issue of unity of use, some courts holding that ownership by the same property owner of other lands in close proximity to the appropriated land, standing by itself, is without legal significance.

Id. In short, "as a general rule, unity of use, or integrated use, is the controlling factor, not physical contiguity." *Id.*

The Model Eminent Domain Code (1974) also recognizes the predominating importance of unitary use over mere contiguity in determining the whole of the relevant parcel. Section 1007, whose very title ("Entire Property") strongly recalls the parcel as a whole concept, sets out "the rule for determining whether two or more parcels of real property under single ownership should be treated, for purposes of determining compensation, as a single unit or as several separate parcels." Model Eminent Domain Code § 1007 cmt. That rule states, in part, "all parcels of real property, ***whether contiguous or noncontiguous***, that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use *as*

an integrated economic unit, shall be treated as if the entire property constitutes a single parcel." § 1007 (emphasis added). *See also* 26 Am. Jur. 2d *Eminent Domain* § 290 (Westlaw 2016) ("single integrated use" key factor).

As the Model Code's expression "an integrated economic unit" suggests, unity of use should mean considerably more than, in some general sense, the same use, or the same kind of use, or a common use. The New York Court of Appeals' decision in the *Penn Central* case illustrates why. That court ruled that even if regulation caused Grand Central Station itself to operate at a loss, Penn Central owned other, "heavy real estate holdings in the Grand Central area, including hotels and office buildings," and "[s]ome of this income," the court declared, "must, realistically, be imputed to the terminal" because the terminal "acts, in effect, as a magnet" and draws commerce to those more profitable enterprises. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 333-34 (1977). In other words, the court aggregated with Grand Central station other, "varied" business properties because they, like the station, were dedicated to the same general kind of use, i.e., commercial profit-making, and were presumed to receive an "indirect[] benefit" from their proximity to the station. *Id.* at 336. This Court, in its own decision in that case, *sub silentio* declined to travel down that narrow, winding path of reasoning, and later described the state court's approach as "an extreme—and, we think, unsupportable—view of the

relevant calculus."[5] *Lucas*, 505 U.S. at 1016 n.7. *See also* William W. Wade, Penn Central's *Economic Failings Confounded Takings Jurisprudence*, 31 Urb. Law. 277, 283 (1999) ("Judge Breitel [the author of the state court opinion] failed to recognize that the existing hotels and office buildings already laid claim to the flow of income that he arbitrarily and without legal or economic foundation chose to share with Grand Central in lieu of the income from the fifty-five-story building.").

Eminent domain law is instructive on the regulatory takings issue now before the Court because both areas of law ask a common question: what parcel (if any), other than the one directly affected by government action, must be considered along with it in order to evaluate the claim for compensation, in a fair and just way, in relation to the *whole* of the relevant property?

Because they both must answer this question, it is not enough merely to note, as the Ninth Circuit once did, that the purpose of a severance damages analysis in eminent domain law is to ascertain takings damages, whereas in a regulatory takings analysis the concern is takings liability. *See American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981) (rejecting use of severance damages factors to assist in identifying parcel as a whole in regulatory takings case). As the Florida Supreme Court later observed,

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[5] As the city's counsel in *Penn Central* would later relate, the city itself lost no time in informing this Court that it did not adopt the New York court's reasoning. *See* Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Envtl. L. Rev. 287, 290-91 (2004).

"[t]he critical issue in the severance cases—whether allegedly discrete parcels are in fact one tract for purposes of determining a compensable taking—is identical to the issue in this [regulatory takings] case." *Dep't of Transp., Division of Admin. v. Jirik*, 498 So.2d 1253, 1255 (Fla. 1986).

The reasons put forth here as grounds for answering the Question Presented in the negative originate in *Penn Central* itself and in a body of law closely akin to regulatory takings law and employing wide-spread, well-tested principles. The Court should therefore reject the narrow, overly inclusive two-factor rule, under which "contiguousness is the key fact," as the Wisconsin Court of Appeals erroneously held. *Murr v. State of Wisconsin*, No. 2013AP2828, 2014 WL 7271581, at *4 (Wis. App. Ct. Dec. 23, 2014) (per curiam).

CONCLUSION

For the reasons stated above, the Court should hold that the categorical, two-factor rule stated in the Question Presented is not required anywhere in *Penn Central* and is inconsistent with that case. Furthermore, because the purported rule is also inconsistent with fairness and justice, the Court should decline to adopt it now.

Respectfully submitted,

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JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ Of Certiorari To The Wisconsin Court Of Appeals

BRIEF OF PROPERTY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF PROPERTY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The undersigned property law professors respectfully submit this brief as *amici curiae* in support of Respondents.[1]

INTEREST OF *AMICI CURIAE*

Amici have no personal stake in the outcome of this case; their interest is in assisting the parties and the Court in understanding property law and the law of Takings, insofar as that law and those rights are relevant to the questions presented in this case. Joining in this brief as *amici* are the following twelve law professors, whose research and teaching have focused on property law:

Gregory Alexander, A. Robert Knoll Professor of Law, Cornell Law School

Michael Barsa, Professor of Practice, Northwestern Pritzker School of Law

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), all appropriate parties have filed letters granting blanket consent to the filing of *amici curiae* briefs.

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SUMMARY OF ARGUMENT

The question of the role of state law in defining the boundaries of property interests for purposes of federal Takings analysis has been raised by the petitioners and various *amici* in this case. Because federal Takings liability is premised on the federal Constitution, and serves a distinct federal constitutional objective of achieving fairness and justice, state property law definitions and corresponding boundaries cannot determine or even presumptively determine the relevant property interest for purposes of determining the denominator used in both the *Penn Central* and *Lucas* Takings analyses.

Past Supreme Court precedent is consistent with this view: state boundary lines have never been treated as determinative or presumptively determinative by this Court. On the contrary, this Court has treated state boundary lines as neither determinative nor presumptively so in cases such as *Penn Central*, *Keystone*, and *Palazzolo*. Contrary to the suggestion of some *amici*, moreover, there is no principled reason for giving more weight to horizontal state property boundaries between lots than there is to give weight to state law vertical boundaries of the sort at issue in *Keystone* and *Penn Central*.

The goals behind state lot lines and the purposes that animate the Fifth Amendment Takings Clause are not, in any way, inherently, connected. How much an owner's reasonable investment expectations were frustrated – the focus of Takings analysis – is relevant

to the level of burden on the owner and the justice of compensating or not compensating. State property definitions and corresponding boundary lines – and in particular, surface/horizontal lot lines – reflect historical practices serving technical, and administrative purposes that are unrelated to the purposes of protecting investment expectations or assuring justice and fairness. Indeed, blindly using state boundary lines to define the property for Takings purposes can lead to palpably unfair and unjust results, wherein some owners whose reasonable expectations were only minimally frustrated by government regulation would be much more likely to prevail in Takings litigation than owners whose reasonable expectations were very substantially frustrated.

Moreover, treating state lot lines as determinative or presumptively determinative would encourage manipulation on the part of owners that is not socially productive and that could lead to much more litigation and the payment of compensation in cases in which fairness and justice does not support such payment. Owners can easily change property lines by subdividing property and sometimes also by rebundling it. Given that factual reality, a holding that state lot lines are determinative or presumptively determinative would encourage gaming of the system, whereby investors choose to divide investments into smaller and more discrete parcels than they otherwise would. Owners would be incentivized in particular to establish any areas of possible future regulatory concern (such as wetlands) as a distinct legal parcel, even when such a

parcel is clearly part of a larger development project. Under a rule that gives determinative or even presumptively determinative weight to state boundary lines, an investor could manufacture a very strong *Lucas* 100% "total wipeout" claim for compensation even when the regulatory restriction at issue only modestly or minimally reduces the value of the investment project.

State property definitions and corresponding boundary lines – including lot lines – should not be determinative or presumptively determinative of the denominator used to calculate the diminution in value for purposes of the *Penn Central* and *Lucas* tests. To give them determinative or presumptively determinative weight would be contrary to precedent, inconsistent with the purposes of the Takings Clause, and likely to encourage socially unproductive gaming behavior in land markets.

ARGUMENT

A. Precedent Does Not Support Giving State Boundary Lines Determinative or Presumptively Determinative Weight

State law establishes all sorts of boundaries between different interests that can be held by different owners or by the same owner. Those boundaries can be vertical, as, for example, the boundary between a surface interest in land and sub-surface interest or the boundary between a surface interest and the

above-surface airspace. These boundaries can also be horizontal, as, for example, the boundary between two contiguous surface interests.

This Court's precedent treats these state boundary lines as neither determinative of the "property" that is at issue for Fifth Amendment Takings Clause purposes, nor as presumptively determinative. On the contrary, this Court has readily looked beyond state boundary lines in analyzing what property was at issue for Fifth Amendment purposes and how much that property's value has been diminished by regulation. As Professor Merrill has explained, the problem with "pure positivism" – an approach that would define as federal constitutional property for Takings Clause purposes whatever is defined as a property interest under state law – "is that it leads to the positivist trap, in the form of too much or too little property relative to social expectations or other normative commitments of the Justices about the kind of things that should be protected as property." Thomas Merrill, *The Landscape of Constitutional Property*, 86 U. VA. L. REV. 885, 950 (2000).

Two leading Takings cases – *Penn Central* and *Keystone* – implicate state law that establishes vertical boundaries and, in both cases, the boundaries play no role in the Court's understanding of the relevant property for Fifth Amendment purposes. In *Penn Central*, the Court refused to treat air rights as a separate property for Fifth Amendment purposes from the surface structure below even though New York law treated air rights as a distinct, alienable interest. In *Keystone*, this

Court refused to treat a sub-surface estate recognized under Pennsylvania law as a separate property for Fifth Amendment purposes.

> As the Court explained in *Penn Central*:
>
> > [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey*, *supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), and the lateral, see *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927), development of particular parcels. 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the 'landmark site.'"

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978).

Building on *Penn Central*, the Court in *Keystone* explained that "[i]t is clear, however, that our takings jurisprudence forecloses reliance" on "legalistic distinctions within a bundle of property rights." *Keystone v. Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987). As the Court elaborated: "For example, in *Penn Central*, the Court rejected the argument that the 'air rights' above the terminal constituted a separate segment of property for Takings Clause purposes. . . . in *Andrus v. Allard*, we viewed the right to sell property as just one element of the owner's property interest. . . . In neither case did the result turn on whether state law allowed the separate sale of the segment of property." *Id.* This Court in *Tahoe-Sierra* similarly suggested that the temporal boundaries created by state law did not define the relevant property at issue for Fifth Amendment purposes. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002).

Palazzolo is also highly instructive. Petitioner Anthony Palazzolo owned what this Court described as a waterfront "parcel" or "property" of land in the town of Westerly, Rhode Island. The Court repeatedly referred to the entire contiguous area of land owned by the petitioner as "the property," as a singular property. That "property" was first purchased as three separate lots under state law, then subdivided into eighty lots, of which seventy-four remained at the time the petitioner sought to develop the wetland portions of the area consisting of seventy-four lots. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). This Court held that because the

petitioner without question derived economic value from the upland portion of the property, which, again, consisted of seventy-four lots under state boundary rules, the court below had not erred in finding that petitioner's property has not been 100% diminished in value and thus did not implicate the test annunciated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). If this Court had treated each lot as a "property" for Fifth Amendment purposes, it presumably would have found that there had been a 100% diminution in value.[2]

The facts of *Palazzolo* itself underscore why, in general, state boundary lines between lots should not determine the contours of the property at issue for Fifth Amendment purposes. The number of lots in a given area is not, contrary to the suggestion of some *amici*, an immutable fact. There were seventy-four lots in the physically contiguous area owned by the petitioner in *Palazzolo* because the landowner decided to subdivide the property into eighty lots and then to sell six of them. The owner presumably could have chosen a different number of lots to carve out of the land area

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[2] It is true that the Court in *Palazzolo* declined to address petitioner's argument that the wetlands portion of his property should be treated as distinct from the uplands portion. The argument was made for the first time before this Court and therefore was deemed waived. *Palazzolo*, 533 U.S. at 631. The petitioner in *Pallazolo* did not attempt to argue that the denominator for the purpose of Takings analysis should be defined based on lot lines in the briefing in the Rhode Island courts. The history of briefing in *Palazzolo* confirms lot lines in contiguous land holdings are generally understood as technicalities rather than as demarcating meaningfully separate, distinct investments in land.

– say ten or twenty or forty lots instead of eighty. But the "property" owned by the petitioner in any sense that should be meaningful for the Fifth Amendment would have been the same however many lots the owner had decided to create as part of the subdivision process. State boundary lines between lots are not the product of natural law or even necessarily a considered state or local legislative decision; instead as in *Palazzolo*, and as discussed more below, they may be in substance the product of the decision making of the owner of the physical area of land in question.

There is simply no principled basis for treating horizontal boundary lines created by state law as having any greater weight in defining Fifth Amendment property than vertical boundary lines created by state law. If horizontal state lot lines were treated as determinative or presumptively so, it logically would be impossible not to apply the same reasoning elsewhere and thus to unravel the principle articulated in *Penn Central* and *Keystone*. The result would be the unravelling of the parcel-as-a-whole rule, a rule that prevents plaintiffs from "defining the property interest taken in terms of the very regulation being challenged," *Tahoe-Sierra*, 535 U.S. at 331. *See also* David A. Dana, *Why Do We Have A Parcel-As-A-Whole Rule?*, 39 VT. L. REV. 617 (2015) (arguing that the principal alternative to the parcel-as a-whole rule in Takings cases – an approach that treats the property as solely the area affected by regulatory restriction – could open a broad range of ordinary economic regulation to, in effect, heightened scrutiny). The principle enunciated in

Penn Central and *Keystone* – that the definition of property for Fifth Amendment purposes cannot be driven by "legalistic" state categories that were not created and implemented with Fifth Amendment values and purposes in mind – is as applicable to horizontal boundary lines as much as it is to vertical ones.

B. Giving State Boundary Lines Determinative or Presumptively Determinative Weight Would Not Promote the Fifth Amendment's Goal of Assuring Fairness and Justice

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The Fifth Amendment Takings Clause is intended to assure fairness and justice – and, in particular, to ensure that excessive burdens are not imposed on property owners without compensation while at the same time allowing many uncompensated burdens so that government can "go on." The purpose of the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation "is to prevent the government from 'forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Because the Takings Clause is concerned with the fairness (or lack thereof) of the imposition of particular burdens without compensation, one highly relevant factor is the magnitude of the burdens imposed on an owner in any given case. This Court generally has not looked to the dollar amount of the burden imposed by regulatory change as relevant to the burden for Takings Clause purposes, presumably because that would move Takings analysis away from the textual focus of the Takings Clause on "property" (as opposed to simply money) and toward an open-ended substantive due process analysis that could encompass a wide range of ordinary economic regulation. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (explaining that limiting the Takings Clause to cases involving government action "to destroy, or take, a specific property interest" serves to prevent the expansion of "an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause.") (Kennedy, J., concurring). Instead, in Takings cases, the focus has been on the diminution in value of the property at issue due to regulatory change. Diminution in value figures prominently in the *Penn Central* test, and is decisive as to whether the *Penn Central* or *Lucas* tests apply. Diminution in value is surely part of these tests because it captures in some fashion the burden imposed on the owner. *See Penn Central*, 438 U.S. at 124 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations").

But if the burden imposed on the owner is what drives the use of diminution of value as part of Fifth Amendment Takings tests, then the components used as part of the diminution in value calculation should also be ones that make sense in terms of the overriding purpose of approximating the burden on the owner. In particular, the denominator – the property – should be assessed in a way that comports with the burden-approximation purpose of diminution in value. An investor bears a greater burden – all else being equal – when a large percentage of what it reasonably conceived of and treated as a distinct investment is reduced in value as compared to when there is a small percentage reduction.

The formal boundary lines between lots under state law, however, tell us nothing about the burden on the property owner and hence are unsuitable as determinants or presumptive determinants of what constitutes "the property" for Fifth Amendment purposes in a given case. When calculating the denominator for purposes of the diminution in value, it may be quite reasonable for a court to consider a fifty-acre area that a developer purchased to build townhomes for sale and hence regarded as a distinct investment as "the property" for purposes of calculating the diminution in value. But the fifty-acre townhome development area could be purchased by the developer or later reconfigured onto one or ten or fifty or a hundred lots. Lot lines can be configured and reconfigured in many ways at the behest of subdivision developers. The investment in any meaningful sense would be the same regardless

of the number of lots, and so too, presumably, would the burden imposed by any particular regulatory restriction. In and of themselves, state law boundaries are uninstructive about the scope of a distinct investment as reasonably conceived by an investor and the corresponding extent to which a burden has been imposed upon the investor. Accordingly, lower courts have held that a contiguous land area under common ownership – an area an investor generally would regard as a single investment because of physical unity – presumptively constitutes a single investment and hence a single property for Fifth Amendment purposes. *See, e.g.*, *Giovanella v. Conservation Commission of Ashland*, 857 N.E.2d 451, 457-458 (Mass. 2006) (reviewing the cases holding that contiguous properties constitute a single property).

Indeed, treating state lot lines as determinative or presumptively determinative of the "property" for Fifth Amendment purposes could result in compensation for less burdened owners and no compensation for more burdened owners. Consider two cases – (1) an investor who buys a ten-acre lot near a river and (2) an investor who buys two contiguous five-acre lots near a river. Imagine that new regulatory restrictions regarding wetlands are enacted that prevent the owner of the ten-acre lot from building on nine of the ten acres, whereas new regulatory restrictions regarding wetlands prevent the owner of the contiguous five-acre lots from building on one of the five-acre lots but allows building on the entirety of the other five-acre lot. In a regime where lot lines are determinative or

presumptively determinative of what constitutes a Fifth Amendment property, the owner of the two five-acre lots has a much stronger claim for a *Lucas*-style Taking of the property *qua* a single five-acre lot than does the owner of the ten-acre lot even though the owner of the ten-acre lot was actually burdened with a more extensive development restriction.

State boundary lines are surely drawn for a variety of reasons, but nowhere, we believe, are they drawn by state or local legislative bodies, planning commissions or subdivision developers themselves with the ideas of fairness and justice in mind that are at the heart of the Fifth Amendment Takings Clause. State lot lines are not intended to capture the line between assets and resources that are or can be privately owned and those that are publicly owned and/or subject to special public claims. State boundary lines are not drawn to approximate or limit the scope of distinct investments by a particular investor in land. Nor do such lines necessarily correlate in any fashion with the burden of regulatory restrictions on land development. They are "legalistic distinctions," *Keystone*, 480 U.S. at 499, that should not determine when a Taking has or has not occurred.

C. Giving State Boundary Lines Determinative or Presumptively Determinative Weight Would Encourage Socially Unproductive Gaming On the Part of Investors

Takings law – as does all law – helps shape private conduct. In particular, we might anticipate that, as rational economic actors, land developers will try to maximize their ability to demand and recover compensation from the government should regulatory restrictions be adopted that would limit their development plans in particular investments. Even if not all investors in land are driven by profit maximization goals, surely many, and many of the largest, are.

If this Court were to suggest or hold that state boundary lines are determinative or presumptively determinative of property definitions for Fifth Amendment Takings purposes, then land developers and even ordinary owners would have a strong incentive to configure and reconfigure their land holdings into smaller lots so that they could demand compensation whenever a regulatory restriction blocked development on a single lot. A subdivision developer of an area near wetlands, for example, might choose to carve out several separate lots that contained only wetlands so that, if a Clean Water Act Section 404 permit to fill the wetlands were denied, the developer could argue that he had lost 100% of the value of several properties and was entitled to compensation under the *Lucas* test. Because possible regulation is often in the air – under scientific and political debate – regarding environmentally sensitive areas for years before it is actually promulgated

and implemented, investors could anticipate portions of their land holdings that might be subject to future regulation and configure them into very small lots under state law so that regulators would be deterred from ever acting to protect the environmentally sensitive areas and, if regulators did act, the investors would be well-positioned to argue that they were entitled to compensation under the *Lucas* test.

Wisconsin law itself suggests how easily a subdivision developer may be able to determine the number and configuration of lots. Wisconsin law clearly anticipates that the developer – the subdivider, in the parlance of the statute – will submit its version of the platting for review and approval. Wis. Stat. Section 236.11. The approval need not be given by a local legislative body but rather can be delegated to "a planning committee or commission of the approving governing body." Wis. Stat. Section 236.10. Wis. Stat. Section 236.40 also allows an individual subdivision owner or lot owner to seek replatting or alteration of plat lines. Although public notice and court approval is required for replatting, there are no statutory restrictions on what a court in its discretion may approve except for areas currently dedicated to the public.

In *Lucas*, Justice Stevens expressed concern about gaming actions involving lot lines on the part of landowners, suggesting that "investors will manipulate the relevant property interests, giving the Court's [*Lucas*] ruling [regarding 100% diminutions in value] sweeping effect." But that has not happened to any widely noted extent, in large part one might suppose because

courts have not treated state boundary lines as determinative or presumptively determinative of what constitutes a property for Fifth Amendment purposes and hence have not rewarded and encouraged manipulation on the part of investors. A holding by this Court that gave state boundary lines determinative or presumptively determinative effect would facilitate the manipulation of the sort described by Justice Stevens.

In sum, treating state boundary lines as determinative or presumptively would encourage investors in and owners of land to convert many situations that would be analyzed under the *Penn Central* ad hoc balancing, less than 100% diminution in value framework into situations analyzed under the *Lucas*, presumptive Taking, 100% diminution in value framework. It would expand the scope of the *Lucas* test beyond the quite limited swath of cases which this Court has explained was its intended scope. *Lucas*, 505 U.S. at 1018 ("And the *functional* basis for permitting the government, by regulation, to affect property values without compensation – that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses"); *Tahoe-Sierra*, 535 U.S. at 1438 (explaining that "our holding [in *Lucas*] was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'").

Elevating the role of state law boundaries in defining Fifth Amendment property could vastly expand the compensation guarantee under the Fifth Amendment to the point that, with respect to some kinds of socially valuable land regulation, government could hardly go on. Effective land use regulation that fairly balances public and private needs and objectives would be undermined by according state boundary lines determinative or presumptively determinative weight with regard to what constitutes "property" for purposes of the Fifth Amendment. *See Tahoe-Sierra*, 535 U.S. at 339-341 (explaining that a rule that held temporary moratoria to be Takings would discourage regulators' attempts to address environmental problems in a way that treated landowners evenhandedly).

CONCLUSION

In sum, state boundary lines between lots do not and should not define or presumptively define the contours of the "property" for purposes of the Fifth Amendment Takings Clause. The decision of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

JOSEPH P. MURR, *ET AL.*,

Petitioners,

v.

STATE OF WISCONSIN AND
ST. CROIX COUNTY, *ET AL.*,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTEREST OF THE *AMICUS CURIAE*[1]

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, property rights, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Penn Central Transp. Co. v. City of New York*,

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[1] Rule 37 Statement: All parties received timely notice of *amicus*'s intent to file this brief; the parties' letters granting blanket consent to *amicus* briefs have been lodged with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus* made a monetary contribution to fund its preparation or submission.

438 U.S. 104 (1978), this Court held that whether government regulation of property constitutes a compensable taking was to be determined using an *ad hoc*, multi-factor test. The Court noted that it "has been unable to develop any 'set formula' for determining when 'justice and fairness'" required that owners be compensated, and that the validity of regulations that impose losses upon property owners "depends largely 'upon the particular circumstances [in that] case.'" *Id.* at 124 (citations omitted) (brackets in original).

Penn Central also noted "several factors that have particular significance" in that inquiry; the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with investment-backed expectations," and the "character of the governmental action." *Id.*

Most germane here, the Court stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site." *Id.* at 130-31.

Crucially, *Penn Central* did not contest that the designated landmark site was the appropriate par-

cel for consideration. Thus, this Court had no occasion to analyze whether the undisputed "parcel as a whole" was, in fact, the relevant parcel for regulatory takings inquiry.

Although this Court has referred to "parcel as a whole" in several subsequent cases, it never has ruled upon how the relevant parcel in regulatory takings cases is to be determined with respect to the most fundamental of property rights—horizontal fee interests in land.

Amicus respectfully submits that (1) the "relevant parcel" inquiry is an integral part of the *Penn Central* adjudicatory process; (2) like other significant circumstances, "relevant parcel" is to be determined through fact-intensive *ad hoc* inquiry; and (3) the proper starting point for the analysis is due regard for facts of independent legal significance, such as ownership rights in deeded parcels under the established state law of property.

The selection of the proper relevant parcel sometimes is termed the "denominator problem," since the severity of the impact of a regulation on a claimant is measured using both the absolute amount of loss (the takings fraction numerator), and also the extent of the claimant's ownership that is appropriate to take into account (the takings fraction denominator).

The arbitrary rule proposed by Respondents would require that separately deeded parcels be combined for regulatory takings purposes if the parcels were contiguous and had common ownership, thus inflating the takings fraction denomina-

tor and diminishing the claimant's loss. The proffered rule would disregard important case-specific facts and circumstances, such as when the individual parcels were acquired, how they were used, and the intent of their common owner. Such a rigid rule would eliminate *ad hoc* inquiry into the relevant facts, the bedrock principle at the heart of *Penn Central* analysis.

The proposed formulation also would be remarkably under-inclusive. Unless it is Respondents' unstated premise that parcels that are *not* both under absolutely identical ownership *and* literal contiguousness should be treated as independent for regulatory takings purposes, courts still would be bereft of guidance as to the proper treatment of many—perhaps the substantial majority—of relevant parcel cases. While the carve-out advocated by Respondents would satisfy their immediate purposes, it would assist neither states and localities nor landowners by clarifying their legal rights and responsibilities.

Amicus further respectfully submits that this Court should base its relevant parcel jurisprudence on the presumption that parcels should be combined for regulatory takings purposes only if the relationship among them would constitute appropriations of use in one parcel for the benefit of another, independent of the identity of the respective parcel owners. For example, servient parcels might be appropriated to the use of a dominant parcel. In addition, a common owner might have acquired separately deeded parcels with the intent to develop them in accordance with an integrated scheme.

Unless a state or political subdivision could meet the burden of establishing facts that supervene the basic principle that separately deeded parcels have integrity as such, regulatory takings law should not disregard that separately deeded parcels are separate entities for legal purposes.

ARGUMENT

I. USE OF A *PER SE* RULE TO DETERMINE THE RELEVANT PARCEL IS CONTRARY TO *PENN CENTRAL*'S MANDATE FOR *AD HOC* AND FACT-BASED INQUIRY

A. The Preeminence of *Penn Central* and Fairness in Regulatory Takings Jurisprudence

Grand Central Terminal "is one of New York City's most famous buildings . . . and a magnificent example of the French beaux-arts style." *Penn Central*, 438 U.S. at 115. The New York City Landmarks Commission designated it a "landmark," meaning that the Commission had to approve exterior changes to structures on the landmark site. In 1968, Penn Central entered into a long-term lease agreement for the construction of a 55-story building above the terminal. Although it was uncontested that all other zoning and building requirements were met, the Commission denied the application on the grounds that the building would be "an aesthetic joke." *Id.* at 115–18.

The New York Court of Appeals, attributing much of Grand Central Terminal's value to its interactions with the vibrant commercial area that grew up around it, held there was no taking. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1275 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The court also attributed to the value of the historic site income generated by the plaintiffs' extensive real estate holdings in the area. 366 N.E.2d at 1276. This Court affirmed.

The leitmotif of *Penn Central* was its use of *ad hoc*, multifactor analysis. That analysis remains the "polestar" of this Court's regulatory takings jurisprudence. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.") Apart from "two relatively narrow categories" of physical and permanent takings, and also exactions, "regulatory . . . challenges are governed by the standards set forth in *Penn Central*." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

Of the three factors set forth in *Penn Central* as having "special significance", *Lingle*'s summary of its regulatory takings doctrine focuses upon "economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 548. In explaining the animating principle underlying the Takings Clause, this Court "emphasized its role in 'bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at

537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Indeed, *Penn Central*'s "no set formula language" might be "simply one way of expressing a pragmatic approach to decision making. Pragmatism is essentially particularist, essentially context-bound and holistic; each decision is an all-things-considered intuitive weighing. Pragmatism is indeed 'essentially' ad hoc." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680 (1988).

In the seminal article on takings law, Professor Frank Michelman viewed compensation as "a response to the demands of fairness," and a "balancing test" as taking into account both societal well-being and losses to the property owner. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1234–35 (1967).

"The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure . . . ." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting) (citations omitted).

Penn Central's analysis employed "essentially ad hoc, factual inquiries." 438 U.S. at 124. The Court added that "several factors that have particular significance" in that inquiry; the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has inter-

fered with investment-backed expectations," and also the "character of the governmental action." *Id.*

The "economic impact" and "investment-backed expectations" tests refer to *value*, while the Takings Clause protects *property*. U.S. CONST. amend. V. ("nor shall private property be taken for public use, without just compensation."). Although it is not self-evident why *Penn Central* integrated into its takings test the economic impact of a regulation upon the claimant, an economic effects test is helpful in assessing when fairness requires compensation.

The second test relates to "distinct investment-backed expectations." *Id.* In his opinion for the Court, Justice Brennan cited *Pennsylvania Coal Co. v. Mahon*, 60 U.S. 393 (1922) as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central*, 438 U.S. at 127. Justice Brennan also cited Professor Michelman, in whose article the phrase originated. *Id.* at 128 (citing Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. at 1229–34 (asking whether a given regulation "can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation")). In placing emphasis on expectations, Professor Michelman was concerned with fairness and reliance.

> The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land specula-

> tor who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before. *Id. at 1234.*

In a quarter-century retrospective on *Penn Central*, Justice Brennan's judicial clerk who worked on the opinion observed that "[t]he concept of 'investment backed expectations' definitely came from Michelman's article." Transcript, *Looking Back on* Penn Central*: A Panel Discussion With the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 309 (2004) (remarks of David Carpenter, Esq.).

The example given in *Penn Central* for its third articulated test, "the character of the governmental action," was a "physical invasion by government, [as distinguished] from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. Four years later, permanent physical invasions were removed from *Penn Central*'s ambit when they were deemed categorical takings in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Notably, fairness still appears to be at the heart of "character of the regulation" cases. A four-Justice plurality of this Court, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), noted that the imposition of severely retroactive liability on a limited class of parties presents a case where "the nature of the governmental action . . . is quite unusual" and augurs in favor of a taking. *Id.* at 537.

"Targeting" a particular item of property or owner for adverse treatment also has been viewed as possessing a "character" supporting takings liability. In *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36 (2001), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004), the Court of Federal Claims analyzed a statute imposing severe economic losses upon the owner of a single fishing vessel, as if that vessel were mentioned by name. "The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking." 49 Fed. Cl. at 51.

Similarly, in *Lost Tree*

Village Corp. v. United States, 115 Fed. Cl. 219, 225 (Fed. Cl. 2014) *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015), the Court of Federal Claims stated that "in applying the *Penn Central* factors, [it] determined that the character of the governmental action tended to favor Lost Tree because the Corps [of Engineers] treated Lost Tree more adversely than it would have treated another applicant . . ." *Id.* at 225 (citing *Lost Tree*, 100 Fed. Cl. 412, 438–39 (2011)).

B. The Crucial Role of the Relevant Parcel Determination

A decade after *Penn Central* was handed down, Chief Justice Rehnquist explained that "[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel." *Keystone Bituminous Coal Ass'n v. DeBen-*

edictis, 480 U.S. 470, 514-15 (1987) (Rehnquist, C.J., dissenting). After quoting Chief Justice Rehnquist, the U.S. Court of Appeals for the Federal Circuit added that the relevant parcel issue

> is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, "one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction."

Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) (quoting *Keystone*, 480 U.S. at 497).

An important example of the crucial role of relevant parcel was in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in

> value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id. at 1016 n.7 (comparing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("law restricting subsurface extraction of coal held to effect a taking" and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) ("nearly identical law held not to effect a taking")).

Although courts and commentators often speak of the "three-factor" *Penn Central* test, there is no way to evaluate those or other relevant considerations bearing upon a specific dispute without discerning the parcel to which they apply. Thus, relevant parcel should be regarded as a factor equal in importance to those conventionally enumerated. *See* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014).

C. Litigants Seek Advantage Through Both "Conceptual Severance" *and* "Conceptual Agglomeration"

As the Supreme Judicial Court of Massachusetts observed: "Repeated admonitions to use the 'parcel as whole,' however, do little to define the contours of that whole parcel in any particular case." *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006).

The term "conceptual severance" was coined by

Professor Margaret Radin to describe the process of "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

However, describing the relevant parcel to obtain a litigation advantage is an activity that can be engaged in by government regulators as well as landowners. While "a taking can appear to emerge if the property is viewed too narrowly," it is just as true that "[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991). The process by which a government entity delineates an interest that is artificially large, for the purpose of diluting the impact of the regulation so as to reduce its severity and the likelihood that a court would find a regulatory taking, might be termed "conceptual agglomeration." Steven J. Eagle, REGULATORY TAKINGS, § 7-7 (5th ed. 2015).

A classic instance of conceptual agglomeration was the opinion below in *Penn Central* by the New York Court of Appeals. *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The court stated that "plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the terminal not in operation. Some of this income must, realistically, be imputed

to the terminal." *Id.* at 1276. This Court subsequently termed the New York court's view of relevant parcel "an extreme—and, we think, unsupportable—view of the relevant calculus." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

Another extreme example of agglomeration was the "unity of ownership" theory developed by the California Coastal Commission. CAL. COASTAL COMM'N, STAFF REPORT: REGULAR CALENDAR 82 (2010) available at http://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf. Under this theory, the Commission asserted that five large parcels, each zoned for a single residence, should be combined, so that only one house could be built in total. The asserted reason was that the contiguous but separately deeded parcels, although having no commonality of ownership, should be combined because the separate owners planned to develop a road to their remote area and to design their separate homes with some architectural harmony. The five ownership groups filed separate suits to enjoin the Commission. *See, e.g., Mulryan Props., LLLP v. Cal. Coastal Comm'n*, No. BS133269 (Cal. Super. Ct. Oct. 21, 2011) (order consolidating the complaints into one proceeding). The application subsequently was remanded to the Commission, and approved with modifications on December 10, 2015. *See* http://documents.coastal.ca.gov/reports/2015/12/th17a-s-12-2015.pdf (video link to Commission's approval).

D. Relevant Parcel Factors

In determining the relevant parcel, the Federal

Circuit has taken "a flexible approach, designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

A cogent summary of relevant parcel factors is contained in a Court of Federal Claims opinion in *Lost Tree Village Corp. v. U.S.*, 100 Fed. Cl. 412 (Fed. Cl. 2011) *rev'd in part on other grounds*, 707 F.3d 1286 (Fed. Cir. 2013).

> The relevant-parcel analysis focuses on, among other things, "the owner's actual and projected use of the property." *Forest Props., Inc. v. United States*, 177 F.3d 1360 1365 (Fed.Cir.1999); *see also Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005); *Loveladies Harbor*, 28 F.3d at 1181; *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986). Relevant takings precedent has yielded a number of factors that bear on the inquiry, including: (1) the degree of contiguity between property interests, (2) the dates of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands. *See Palm Beach Isles*, 208 F.3d at 1381. The court previously also stated that a sixth factor, "(6) the extent [to which] any earlier development had reached completion and closure" was also a

> relevant consideration in the relevant-parcel analysis. *Lost Tree*, 92 Fed. Cl. [711] at 718 [(2010)].
>
> 100 Fed. Cl. at 428.

Even within the narrow context of contiguous parcels with the same owner, questions arise in even such basic contexts as the separation of parcels by roads. *See, e.g., Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381, *aff'd on rehearing*, 231 F.3d 1354 (Fed. Cir. 2000) (severing fifty acres from larger 261-acre parcel across road in part because property was physically remote); *Coeur D'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) (finding presence of road not determinative, but "one factor to consider"). Questions about common owners arise, as well, not limited to largely overlapping ownerships. *See, e.g., Hersey v. Lonrho, Inc.*, 807 A.2d 1009, 1016 (Conn. App. 2002) ("Although the defendant and its subsidiary companies have overlapping boards of directors, that alone is insufficient to establish the parent's domination or control of the subsidiary . . . .")

A helpful, practical analysis of relevant parcel problems is contained in Dwight Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003).

II. RELEVANT PARCEL ANALYSIS SHOULD BE GROUNDED IN RELATIONSHIPS AMONG PARCELS

A. *Penn Central*'s "Parcel as a Whole" Formulation Was Responsive to the Facts

Presented and Not Intended to Privilege Expansive Views of the Relevant Parcel

"Parcel as a whole," as used in *Penn Central*, 438 U.S. 130–31, is an incompletely described concept, since it appeared in a context where the identity of the relevant parcel was not disputed.

This Court has on other occasions employed takings formulations based on case-specific facts, and also has subsequently repeated them without further analysis. In *Sanguinetti v. United States*, 264 U.S. 146 (1924), for instance, the Court stated that an enforceable liability against the Government for flooding would require an "actual, permanent invasion of the land." *Id.* at 148. Much later, in *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), the Government asserted that damages resulting from severe, recurrent flooding were not compensable, since there was no "permanent" invasion. In rejecting this view, the Court explained that "no distinction between permanent and temporary flooding was material to the result in *Sanguinetti*." Rather, the Court there had summarized the facts in earlier cases. *Id.* at 520. The Court added:

> [W]e recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Id. (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821)).

Just as this Court in *Sanguinetti* developed a formulation based upon the factual permanence of flooding in that and previous cases, it developed in *Penn Central* the formulation "parcel as a whole" upon uncontested facts, with the relevant parcel not at issue:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."
>
> *Penn Central*, 438 U.S. at 130–31.

The railroad's counsel at oral argument acquiesced in the factual predicate that the "landmark site," Grand Central Terminal, was the "parcel," and the air rights above the terminal constituted the "segment." *Id.* at 130. Counsel's failure to stress the separate nature of the air rights was strategic, since in 1978 he deemed the concept of air rights to be novel and "sort of mysterious." *See* Transcript, *Looking Back on* Penn Central, 15 FORDHAM ENVTL. L. REV. at 306 (remarks of Daniel Gribbon, Esq.). Thus, the Court's opinion made only glancing reference to the prior acquisition of the air rights that would be utilized for the rejected office build-

ing by UGP Properties, Inc. *Penn Central*, 438 U.S. at 141.

Now, for the first time, this Court is considering a case where the determination of the horizontal fee parcel of land to which regulatory takings analysis is to be applied *is* contested. In undertaking this inquiry, it is well to begin with Professor Joseph Singer's reminder that "[y]et time and again, the Court has reaffirmed its view that we are better off eschewing 'any set formula' for defining a regulatory taking and that we should 'resist the temptation to adopt *per se* rules.'" Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U.L. REV. 601, 603 (2015) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002)).

Amicus respectfully urges this Court to undertake the necessary analysis using no set terminology that privileges either the landowner or the government. Whereas "parcel as a whole" implies that landowners are trying to sever the property against which the effects of regulation are to be measured, "relevant parcel" correctly indicates that the task of a court is to determine what the appropriate unit of property is.

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002), this Court reviewed its regulatory takings jurisprudence, and added that "[i]ndeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." *Id.* at

326. The Court quoted Justice O'Connor's concurrence in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001):

> "Penn Central does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required. . . . The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."

Tahoe-Sierra, 535 U.S. at 326 n.23 (*quoting Palazzolo*, 533 U.S. at 634, 636 (O'Connor, J., concurring)).

As succinctly recapitulated by the Court of Federal Claims, "[q]uite simply, there are very few *per se* rules in regulatory takings cases." *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 430 n.28 (2011).

B. The Deeded Parcel and Other Criteria

Amicus respectfully urges that this Court not adopt a *per se* test that would conclusively presume that contiguous lands under common ownership constitute the relevant parcel for regulatory takings purposes.

While *Penn Central* analysis requires an ad hoc and fact-intensive inquiry, there are objective indicia that should be given significant weight. The

most important of those is the integrity of the separately deeded parcel. Indeed, while "the parcel as a whole" as used in *Penn Central*, 438 U.S. at 130–31, seems to warn against severance, it is also implicitly ("*the* parcel") consistent with an admonition not to go beyond the parcel's bounds.

The individual parcel served as this Court's implicit baseline in *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993). "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is *all, or only a portion of, the parcel in question.*" *Id.* at 644 (emphasis added).

In some instances, of course, an owner will use separately deeded parcels as one economic unit, or acquire and maintain them to further a unitary purpose. "Deeded parcel" is not a *per se* test precluding a finding that the "relevant parcel" should not include other holdings. Rather, it is a default rule that might be overcome in the course of an ad hoc fact-based *Penn Central* inquiry.

Other objective criteria that should inform "relevant parcel" jurisprudence are the standards of "independent economic viability" and the "commercial unit." Under the "independent economic viability" approach, a taking occurs when "any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation." John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1538

(1994). This test allows for the gathering of appraisals and other evidence by the takings claimant and the government in an attempt to provide that the proffered relevant interest did or did not possess freestanding economic value. Use of this test would permit the claimant flexibility in describing the unit of property that was subject to a regulatory taking, but it could not be merely a subjective or idiosyncratic construct.

Similarly, the "commercial unit" test derives its name and significance from an analogous provision of the Uniform Commercial Code. As defined in the U.C.C., "commercial unit"

> Means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture, or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

UNIFORM COMMERCIAL CODE § 2-105(6)).

The "commercial unit" test would permit a landowner to proffer as the relevant parcel for takings purposes any parcel of land of a type regularly purchased and sold in the locality. Thus, while the owner's Takings Clause rights would be protected, the owner could not designate a bundle of rights that is custom-tailored to minimize the denominator of the takings fraction. *See* Steven J. Eagle, REGULATORY TAKINGS, at § 7-7.

C. Relevant Parcel and Appropriation to Use

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court reconceptualized land use regulations that deprived owners of all economically beneficial use. It changed the focus from harm prevention or benefit conferral to a focus on whether the severe limitation "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

With respect to determination of the relevant parcel, a similar reconceptualization would focus primarily on whether background principles of property law impose servitudes on some land for the benefit of other land. In some situations, a parcel of land could be subject to a quasi servitude when another parcel under common ownership is dependent upon it for access or some other necessary service. When the servient parcel is sold, the dominant parcel retained by the owner is benefitted by the now-ripened servitude. *See, e.g., Van Sandt v. Royster*, 83 P.2d 698, 701-03 (Kan. 1938) (upholding in equity an easement by reservation for a sewer line benefiting an uphill owner, as implied by prior existing use).

Thus, common law property and equity establish relationships of land to land, without any need to focus on the identity of the individuals involved. *See* Steven J. Eagle, *The Parcel and Then Some*, 36 VT. L. REV. 549, 559 (2012).

As in other aspects of *Penn Central* ad hoc anal-

ysis, while background principles of property law provide a significant starting point, they are not conclusive. Three of the six factors for identifying the relevant parcel identified in *Lost Tree*, 100 Fed. Cl. at 428, largely bear upon the relationship among tracts of land. They are factors (1) degree of contiguity; (3) joint use in producing income; and (5) the extent to which some parcels enhance the value of others. *See supra*, at 427-28.

The U.S. Court of Appeals for the District of Columbia Circuit used similar reasoning in *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), when it ruled in a regulatory takings case that the relevant parcel included both an apartment building designated as an historic landmark, and separately deeded lots in front of it that had served as a lawn, and that the owner wanted to repurpose for townhouses. The court declared that, "[a]bove all, the parcel should be functionally coherent. In other words, *more should unite the property than common ownership by the claimant*. Thus, a court must also consider how both the property-owner and the government treat (and have treated) the property. *Id.* at 880 (emphasis added).

In the present case, Respondents concede that Petitioners inherited one lot that their parents initially acquired in 1960, and which always has been used exclusively for a family cabin. The contiguous lot Petitioners inherited was acquired by their parents in 1963, and has always remained vacant. Brief in Opposition to Petition for Writ of Certiorari at 4. The state appellate court flatly held that, "[r]egardless of how that property is subdivided,

contiguousness is the key fact." *Murr v. State*, 859 N.W.2d 628 (Wis. App. 2014) *review denied*, 862 N.W.2d 899 (Wis. 2015), *cert. granted*, 136 S. Ct. 890 (2016). Of the six factors enumerated in *Lost Tree*, 100 Fed. Cl. at 428, the only one present here is contiguity.

While *Penn Central*'s "parcel as a whole" formulation often has been repeated, this Court never has analyzed the relevant parcel concept with respect to its most basic application—a horizontal division of a fee interest in land.

CONCLUSION

Neither the common law of property, nor the application of *Penn Central* ad hoc takings principles, justify an arbitrary, irrebuttable presumption that common ownership of contiguous separately deeded parcels should be treated as one parcel for regulatory takings purposes.

Furthermore, the manifold unsettled issues involving the determination of the relevant parcel in regulatory takings cases cries out for guidance from this Court. *Amicus* respectfully urges that respect for separate legal interests embodied in separately deeded parcels be a significant, albeit not conclusive, consideration.

Respectfully submitted,

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RECORD AND BRIEFS

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In The Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE BEACON CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a regulatory takings case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the protection of private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in SLF's filing of *amicus* briefs in support of property holders in cases such as *Suitum v. Tahoe Regional Planning Authority*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Beacon Center of Tennessee is a non-profit, nonpartisan, and independent Section 501(c)(3) organization dedicated to providing free market solutions for free people in Tennessee. The Beacon Center's vision includes limited government and the robust protection of property rights for individuals through policy and litigation. The Beacon Center believes that an individual should not suffer a taking of their property absent a meaningful and a well

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[1] All parties have consented to the filing of this brief by blanket or individual letter. See Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. See Sup. Ct. R. 37.6.

outlined eminent domain process. The Beacon Center is interested in seeing that more clarity and substantive protection of property rights be brought to the jurisprudence of eminent domain, particularly vis a vis regulatory takings.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Wisconsin Court of Appeals and remand this case for further proceedings. That court's aggregation of two contiguous lots that have otherwise been treated separately is neither fair nor a just treatment of the property owner because it totally deprives the owners of the economic value of one of those lots.

This Court should take the opportunity presented by this case to devise a test for evaluating future attempts to aggregate property. That test should start with a presumption against the proposed aggregation, then turn to the facts regarding the owner's expectations and use of the properties at issue.

ARGUMENT

I. Introduction.

St. Croix County's de facto aggregation of two independent parcels of land solely because those parcels are contiguous and owned by the same persons results in a taking and thus, violates the Fifth

Amendment of the U.S. Constitution. Petitioners, the Murrs, own two adjacent lots (Lot E and Lot F) on Wisconsin's Lake St. Croix in the St. Croix Cove Subdivision. The lots have been in their family for more than 50 years. In 1960, the Murrs' parents purchased Lot F, and, shortly thereafter, placed title in the name of the family's plumbing business and built a three-bedroom recreational cabin on it. Three years later, the Murrs' parents bought Lot E for investment purposes and placed title in their own names. In the mid-90s, title to both Lot E and Lot F was transferred to the Murrs.[2]

While title to both parcels ultimately devolved to the Murr children, the purposes to which they put the lots has not changed since their parents first bought the lots in the 1960s.[3] The recreational cabin built as a family summer getaway still remains on Lot F and Lot E remains vacant. After holding Lot E as an investment property for over 50 years, the Murrs would now like to sell it and use any profit to upgrade the existing recreational cabin on Lot F to ensure that

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[2] Both parcels are held in fee simple. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (Fee simple is "an estate with a rich tradition of protection at common law.").

[3] Use is relevant because a grandfather clause in the regulation allows for building on a site that is too small for the regulations so long as the "lot is in separate ownership from abutting lands." See St. Croix County Code of Ordinances, Land Use & Development, Subch. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36, I.4.a.1 (J.A. at 77). The Murrs' lots are contiguous.

future generations of Murr children have summers full of memories at Lake St. Croix. Unfortunately, a 1975 local ordinance forecloses them from using, selling or developing Lot E separately from Lot F.

In 1975, St. Croix County adopted regulations that restrict development to parcels that have a "net project area" of at least one acre.[4] When the portions of Lot E deemed unusable by the ordinance are deducted, the parcel is too small to build on.

The Murrs sought a variance arguing that because the owners of Lot E and Lot F differed when the ordinance went into effect, the grandfather clause applies. The County denied the Murrs the variance and after exhausting their administrative remedies, the Murrs turned to the courts and brought the current takings claim.

This case thus presents the question: Is the basis for a regulatory takings claim – the relevant parcel – Lot E alone or Lots E and F together? In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), this Court directed the takings inquiry to the "parcel as a whole." *Id.* at 130-31. The "parcel as a whole" principle applies here as it does in

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[4] The St. Croix County Code of Ordinances also provides, "Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area." St. Croix County Code of Ordinances § 17.36, I.4.a.2 (J.A. at 77). Lot E does not have one acre of net project area as defined by the County, so it cannot be sold or developed separately from Lot F.

all takings analyses; however, in *Penn Central*, the Court addressed an attempt to "divide a single parcel into discrete segments" not to aggregate separate pieces of property. *Id.* at 130. Thus, more generally, this case raises the question *Penn Central* does not answer: Whether and to what extent separate properties may be aggregated to form a "parcel as a whole" for takings purposes.

This case presents the Court with an opportunity to guide property owners and governmental bodies through the Scylla and Charybdis straits of takings law. In 1978, this Court instructed all involved that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*. . . ." *Penn Central*, 438 U.S. at 130-31 (emphasis added). Since then, courts have faced substantial difficulty when identifying the "parcel as a whole" in takings cases, in part because of the difficulty of putting the property taken and the regulatory burden in a specific factual context. See generally, John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994).

There is another aspect to the difficulty, as well. Both sides of the equation have moral hazard associated with them. If the parcel at issue is defined too broadly, as the Wisconsin Court of Appeals has done here, the likelihood of a taking disappears. Conversely if the parcel is defined too narrowly, or just as

broadly as the regulatory burden, a taking will more easily be found. See, e.g., *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991); Fee, 61 U. Chi. L. Rev. at 1537. The moral hazard arises because regulators have an incentive to push for broad definitions of the relevant parcel, while property owners have an incentive to advocate for narrow ones.

Amici write separately to demonstrate that defining the Murrs' property interest to include both Lots E and F is neither fair nor just. Contiguity, common ownership (at present), or both, are not sufficient to overcome facts that show the Murrs' interest in those properties was separate. *Amici* will propose consideration of other factors that, taken together, provide a workable multi-factor test for identifying circumstances in which separate properties can be aggregated for takings purposes. Then, they will show that the Murrs should prevail when the test is applied.

II. This Court should adopt a multi-factor test for identifying the relevant parcel in a takings case.

A. All parties will benefit from clarifying how to define the relevant parcel against which the loss of value is to be measured for takings analysis purposes.

While the Court has addressed regulatory takings, it has not clearly mapped out the way to "make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 505 U.S. at 1016 n.7.

Indeed, "[d]etermining the relevant parcel is not only an essential ingredient of the *Lucas* test, but . . . has proven one of the most difficult challenges in takings law." Fee, 61 U. Chi. L. Rev. at 1536; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions in determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"). Accordingly, while this Court's decisions provide general guidance, they do not answer the question posed in this case.

In pertinent part, the Fifth Amendment to the Constitution of the United States provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is applicable to the States through the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). Where regulatory burdens are involved, the point of the Takings Clause is to preclude the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Because the Takings Clause protects interests of private property owners, analysis of regulatory takings claims should begin by identifying and protecting the property owner's interest. Even with that starting point, the government is entitled to regulate

the use of private property without every such regulation giving rise to compensation. As the Court has explained: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Accordingly, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Notably however, this Court has pointed out the way in which a regulatory taking would go "too far." In *Penn Central*, it identified three criteria: (1) the character of the government's action; (2) the economic impact of the regulation on the property owner; and (3) the extent to which the regulation interferes with the owner's investment-backed expectations. 438 U.S. at 124.

In 1992, this Court went further and reversed the decision of the South Carolina Supreme Court holding that the application of South Carolina's Beachfront Management Act did not effect a taking of Davis Lucas's interest in two residential, beachfront lots. *Lucas*, 505 U.S. 1003. It explained that a regulatory taking occurs when a regulatory imposition deprives property of its economically viable use, the property owner has distinct investment-backed expectations, and the owner's interest, as defined by state law, is not within the state's regulatory power under the common law nuisance doctrine. *Id.* Again, though, the denominator of the takings inquiry

remained undefined. *Id.* at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.").

Significantly, this Court pointed out that when, as here, a regulation "denies an owner economically viable use of his land," a taking occurs. *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). It observed that "regulations that leave the owner of land without economically beneficial or productive options for its use – *typically, as here, by requiring land to be left substantially in its natural state* – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018 (emphasis added). And, to the extent that such regulatory idling can be sustained, the Court advised South Carolina that, on remand, it would have to "identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 1031.

Measured against these general standards, the Murrs should be seen to have stated a prima facie case of a taking of Lot E. One would expect that a lot like it, held in fee simple, could be sold, used, or developed, but the regulations bar it. Instead, as Justice Scalia noted in *Lucas*, the regulations require the land to be "left substantially in its natural state." 505 U.S. at 1018. The effect is to frustrate the Murrs'

"investment-backed expectations." *Penn Central*, 438 U.S. at 124.

On remand, the Murrs should be deemed to have stated a takings claim. The parties should address the propriety of aggregating Lots E and F using the factors identified below. For its part, the County should be required to defend its enforced idling of Lot E in its natural state by "identify[ing] background principles of nuisance and property law that prohibit the uses [the Murrs] now intend[ ] in the circumstances in which the property presently is found." *Lucas*, 505 U.S. at 1031.

B. This Court should follow the lead of the Federal Circuit and the Court of Federal Claims in devising a workable and fair multi-factor test for identifying the relevant parcel.

In several cases, the Federal Circuit Court of Appeals and the Court of Federal Claims have taken flexible approaches, applying identified factors that should be considered when a governmental body seeks to aggregate properties to its benefit. Those cases lead the way toward a multi-factor test that is workable and fair.

For example, in *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412 (2011), the court explained that "takings precedent has yielded a number of factors that bear on the inquiry" of defining the relevant parcel. *Id.* at 428. Specifically, the court

identified the following factors as ones that any court should consider:

> (1) the degree of contiguity between property interests, (2) the dates of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands.

Id. (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000). In addition, the *Lost Tree* court identified a sixth factor: "the extent [to which] any earlier development had reached completion and closure." *Id.* (citing *Lost Tree Village Corp. v. United States*, 92 Fed. Cl. 711, 718 (2010) (denying summary judgment on relevant parcel)).

In *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), the Court of Appeals for the Federal Circuit reversed a decision of the Court of Federal Claims, reasoning, in part, that the lower court improperly calculated the denominator of the claimed taking. The Palm Beach Isles development started with the purchase of 311.7 acres of property split by a road. In 1961, 261 acres on one side of the road were sold. The question for takings purposes was whether the denominator was the original 311-acre purchase or the remaining 50.7

acres that Palm Beach Isles was barred from developing by the ordinance.

The government argued that the denominator was 311 acres because all of the land was bought in the same transaction, and that "PBIA should not be allowed to sever the part that is subject to regulation from the part that is not." *Id.* at 1380. The developer noted that the two parcels were not part of a "common development scheme." *Id.* It explained that the two pieces of property "are separated by a road, they are different types of property, subject to different zoning, and PBIA . . . never planned to develop the entire property as a unit." *Id.*

The Federal Circuit rejected the argument that the entire 1968 purchase of some 311 acres should be considered as the takings denominator just because it was all purchased together. The court explained: "Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified." *Id.* at 1381. It went on:

> In this case, PBIA never planned to develop the parcels as a single unit. Furthermore, PBIA bought the land in 1956 and sold the 261 acres in 1968, both events occurring before the environmental considerations contained in the Clean Water Act came into play, beginning in 1972. It is inappropriate to consider those transactions to have occurred in the context of the substance of a regulatory

> structure that was not in place at the relevant times.

Id. (internal footnote omitted).

In *Ciampitti v. United States*, the Court of Federal Claims explained that "[f]actors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus." 22 Cl. Ct. at 318. At issue in *Ciampitti*, were 14 of 45 acres purchased in multiple transactions that the government considered or treated as undevelopable wetlands. *Id.* at 318-20. The property owner sued, alleging a taking of that segment of the 45 acres and arguing that the relevant parcel consisted only of the 14 acres.

Applying the various factors the court enunciated, it ultimately rejected Ciampitti's contention that the "parcel as a whole" was limited to only those lots for which a federal permit was unsuccessfully sought. *Id.* Instead, the court aggregated the properties that composed the 45 acre purchase. *Id.* at 320. In doing so, the court explained that "the most persuasive consideration is that Ciampitti treated all of Purchase 7, which encompasses virtually all the lots at issue, as a single parcel for purposes of purchase and financing." *Id.* The court concluded, "It would be inappropriate to allow him now to sever the connection he forged when it assists in making a legal argument." *Id.*

In *Ciampitti*, the court thus demonstrates an awareness of the way in which defining the property taken affects the takings analysis. *Id.* at 318-19. By declining Ciampitti's invitation to sever his unitary purpose, the court essentially blocked a game-playing effort.

The multi-factor nature of the test proposed is consistent with this Court's approach and should not be a stumbling block. This Court has acknowledged that its takings analysis is one of several "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124; see also *Arkansas Game & Fish Comm'n v. United States*, ___ U.S. ___, 133 S. Ct. 511, 518 (2012) ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."). Identifying facts that distinguish proper attempts to aggregate properties from improper ones will be of assistance to the lower courts when they confront these fact-bound regulatory takings claims.

Before embarking on that factual inquiry, courts should determine whether a claimant has stated a prima facie takings claim, starting with a presumption in favor of the property owner. After all, the Fifth Amendment says that private property shall not be taken without just compensation. Courts should then identify the parcel that has been taken. At that point, the government gets an opportunity to identify the

"background principles of nuisance and property law," *Lucas*, 505 U.S. at 1031, that might support its regulatory imposition.

III. The facts show that it is neither fair nor just to aggregate the Murrs' two lots.

In *Armstrong*, this Court grounded the takings analysis on "fairness and justice." 364 U.S. at 49. The fundamental question is whether the Murrs are being required to bear a burden on their own that should be shared generally.

Measured against the *Lost Tree* factors, the Murrs correctly identify Lot E as the subject of the taking. The attempt of the Wisconsin Court of Appeals to aggregate Lots E and F on the basis of contiguity alone should be rejected. Instead, analysis should focus on the absence of any common use or development scheme. Cf. *Penn Central*, 438 U.S. at 124 (considering the owner's "investment-backed expectations").

More particularly, the Murrs acquired the lots at different times for different purposes. Those purposes remained constant; Lot E is still undeveloped. The Murrs purchased Lot E for investment purposes more than a decade before the regulations made it impossible to build on it, so the Murrs have lost the value of their investment in Lot E.

Significantly, the Murrs have not treated the properties as separate only for the purpose of making

a takings claim. Thus, they are unlike Ciampitti, who purchased and financed the property involved in one transaction. Conversely, the Murrs alleged that the County has consistently assessed the properties as separate for tax purposes. J.A. at 6. Thus, it appears that the County is attempting to game the system. To the extent that equity controls, the Murrs should be permitted to state their case.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amicus* brief, this Court should reverse the decision of the Wisconsin Court of Appeals.

Respectfully submitted,

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No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF OF *AMICI CURIAE* THE WISCONSIN COUNTIES ASSOCIATION, THE WISCONSIN TOWNS ASSOCIATION, AND THE LEAGUE OF WISCONSIN MUNICIPALITIES IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* THE WISCONSIN COUNTIES ASSOCIATION, THE WISCONSIN TOWNS ASSOCIATION, AND THE LEAGUE OF WISCONSIN MUNICIPALITIES IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are voluntary membership organizations representing every level of local government in the state of Wisconsin.

The Wisconsin Counties Association ("WCA") was created to protect the interests of Wisconsin counties and promote the improvement of county government. WIS. STAT. § 59.52(22) (2013–2014). To meet these obligations, the WCA represents interests common to Wisconsin's seventy-two counties by engaging in legislative efforts, educating and training county officials, and participating in legal proceedings regarding matters that affect county governments.

The Wisconsin Towns Association ("WTA") is a voluntary association of member town and village governments organized to protect town interests and improve town government. WIS. STAT. § 60.23(14) (2013–

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[1] The parties' letters consenting to the filing of *amicus curiae* briefs in support of either party or neither party have been filed with the Clerk's office. No counsel for any party has authored this brief in whole or in part, and no person or entity other than the Wisconsin Counties Association, the Wisconsin Towns Association, and the League of Wisconsin Municipalities, or their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

2014). Currently, 1248 towns and 20 villages in the state of Wisconsin are members of WTA. In furtherance of its goals, WTA provides three types of services for its members: legislative lobbying efforts, educational programs, and legal activities.

The League of Wisconsin Municipalities ("the League") was created on December 14, 1898, to help Wisconsin cities and villages share ideas and learn from one another, to train and educate city and village officials, and to advocate on behalf of Wisconsin municipalities to the Wisconsin Legislature, the Governor, and state agencies, as well as in the courts. The League's membership includes all 190 cities and 399 of the 411 villages in Wisconsin.

Since becoming a state in 1848, Wisconsin has always maintained a decentralized system of government. Local issues are identified, debated, and decided by local elected or appointed officials. In Wisconsin, land use regulation is an area where local control is of paramount importance. At times, the preference for local regulatory control can adversely affect an individual's interest in a particular property. In recognition of the possibility for tension between local land use regulations and the rights of property owners, the Wisconsin legislature and local governments have designed a statutory and appellate process that balances regulation by local government with property owners' rights.

The WCA, WTA, and the League submit this brief to support continuation of the balance between individual property rights and respect for decision-making at the local level. Wisconsin has established processes by which local governments regulate land use and administer requests for changes to, or exceptions from, generally applicable property regulations. Courts should not permit property

owners to evade those processes by litigating unripe claims. *Amici* understand and accept constitutional constraints on local governments' land use decisions, but believe such constraints should be imposed, and even considered, only when necessary and only after local government processes have been permitted to run their full course.

This case presents the potential for an unnecessary and unripe constitutional adjudication that would strike down a common land use provision widely employed across Wisconsin and the nation. Striking down the provision as unconstitutional threatens to upend land use regulation and impose broad costs on cash-strapped local governments. Where, as here, such effects would be avoided by fidelity to established prudential principles, the prospect is particularly troubling. For those reasons, *amici* urge this Court not to unnecessarily and prematurely resolve the constitutional question pressed by Petitioners.

STATEMENT OF RELEVANT LEGAL BACKGROUND

1. Wisconsin has a rich history of vesting the power to regulate land use in local governments based on the simple premise that local elected and appointed officials know what is best for their communities. As early as 1909, the Wisconsin legislature empowered cities to create planning commissions and zoning ordinances to implement community land use goals and objectives. Milwaukee was a pioneer in this regard, as one of the first cities in the country to establish a plan commission and, in 1920, the first city in Wisconsin to adopt a comprehensive zoning ordinance. BRIAN W. OHM, GUIDE TO COMMUNITY PLANNING

IN WISCONSIN 91 (1999). While the system is at times imperfect, it places decisions in the hands of persons with the greatest ties to the local community affected by those decisions. Moreover, the comprehensive land use and zoning processes Wisconsin utilizes today draw upon over a century's worth of guidance in balancing the tension between the public good and individual rights.

Wisconsin has four types of municipal subdivisions: counties, cities, villages, and towns. As "incorporated" municipalities, cities and villages possess certain inherent and statutory planning powers. WIS. CONST., art. IX, § 3(1); WIS. STAT. §§ 61.35, 62.23 (2013–2014). Areas of the state that remain unincorporated are governed by town and county governments. Counties enjoy primary planning and zoning authority over the unincorporated areas. WIS. STAT. § 59.69 (2013–2014). In some circumstances, towns can exercise certain planning authority distinct from that of counties. WIS. STAT. §§ 59.69, 60.61 (2013–2014)

2. Administration of zoning in Wisconsin is patterned on the U.S. Department of Commerce's model zoning legislation. *See* U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. 1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf. As a result, Wisconsin divides local zoning power among the local legislative body, the plan commission, and the board of appeals/ adjustment. BRIAN W. OHM, WISCONSIN LAND USE & PLANNING LAW 5-45 (2013 ed.). Under this framework, local governments create a statutorily authorized planning commission that prepares a comprehensive community land use plan, and, in the case of a local government wishing to create a general zoning ordinance, the commission is required to prepare the ordinance and

recommend adoption to the legislative body. WIS. STAT. §§ 59.69(5), 60.61(4), 61.35, 62.23(7)(d). Wisconsin law also allows planning commissions to decide special exceptions and conditional uses. WIS. STAT. §§ 59.694(1), 62.23(7)(e)1 (2013–2014). Boards of appeals/adjustment then sit in a quasi-judicial capacity to review decisions of legislative bodies and administrative officers responsible for implementing and enforcing local zoning codes. WIS. STAT. §§ 59.694, 62.23(7)(e) (2013–2014).

3. In addition, Wisconsin law allows counties, cities, villages, and towns to coordinate in developing and adopting master plans relating to the physical development of the broader regions in which they are situated. WIS. STAT. § 66.1001 (2013–2014). These plans provide consistency and a framework for local legislative bodies to adopt ordinances, and they place questions about local land use within a long-term regional context. A comprehensive plan must consider elements of intergovernmental cooperation among the various local governments in relation to land use and planning. As a part of the planning process, counties and other local governments solicit feedback from the community. St. Croix County's Comprehensive Plan is illustrative: public participation in the planning process included public workshops, a statistically valid public opinion survey, open houses, a webpage with project information, and a public hearing. *See* ST. CROIX CTY., WIS. 2012–2035 COMPREHENSIVE PLAN (adopted Nov. 5, 2012), http://www.co.saint-croix.wi.us/index.asp?SEC={19386-9EB-C649-48C6-A778-A6026605796B}. If the affected municipalities approve a regional master plan, all future zoning code amendments and other land use decisions must be consistent with that plan. WIS. STAT. § 66.1001(3).

4. To implement and administer zoning ordinances, local governments create zoning departments. The overwhelming majority of counties in Wisconsin have a dedicated zoning administrator and staff whose primary function is to provide guidance to local citizens in interpreting ordinances and to decide whether to grant or deny zoning applications and permits. In St. Croix County, for example, applicants for land use permits must send completed applications to the zoning administrator for review. The administrator's review process includes sending each application to appropriate reviewing agencies for comment, visiting the applicant's property, meeting with the applicant, and preparing findings for approval or denial of the permit within 60 days. *See Land Use Permit Application.* ST. CROIX CTY., WIS. (rev. May 2016), http://www.co.saint-croix.wi.us/vertical/sites/%7BBC2127FC-9D61-44F6-A557-17F280990A45%7D/uploads/Land_Use_Permit_Application_Fillable.pdf.

5. A person adversely affected by a local government's land use decision may challenge that decision to the board of appeals, in the case of a city, or the board of adjustment, in the case of a county. Boards of appeals/adjustment are comprised of local residents of the political subdivision. Board of adjustment members must reside in unincorporated areas of the county, meaning the members are subject to the very same zoning code at issue in any appeal. WIS. STAT. § 59.694(2)(c). A board of appeals/adjustment sits in a *de novo* capacity, reviewing administrative land use decisions by local officials or committees. *Osterhues v. Bd. of Adjustment for Washburn Cty.*, 2005 WI 92, ¶¶33–34, 282 Wis. 2d 228, 698 N.W.2d 701.

6. The ordinance at issue here governs land use within the Lower St. Croix Riverway Overlay District. *See* St.

Croix Cty., Wis., Code of Ordinances, Land Use & Dev., subch. III.V, § 17.36 (2005). The ordinance treats adjacent, substandard lots under common ownership as one lot. *Id.* § 17.36.I.4.a.2. This provision is not unique to St. Croix County, nor is it unique to the Lower St. Croix Riverway. Indeed, fifty of Wisconsin's seventy-two counties–nearly seventy percent–have enacted zoning ordinances that effectively combine commonly owned, contiguous, substandard lots into a single lot. *See* App., *infra*.

Specifically, thirty-three counties–more than forty-six percent–implicitly combine commonly owned, contiguous, substandard lots through zoning ordinances. *Id.*; *see, e.g.*, Code of Green Lake Cty. § 350-22(A)–(B) (2015) ("If abutting lands and the substandard lot are owned by the same owner, the substandard lot shall not be sold or used without full compliance with the terms of this chapter.").

An additional seventeen counties–nearly twenty-four percent–explicitly consider commonly owned, contiguous, substandard lots as a single lot. App., *infra*; *see, e.g.*, Bayfield Cty. Ordinance tit. 13, ch. 1, art. B, § 13-1-26(d) (2012) ("If a substandard lot is in common ownership with abutting lands, the contiguous lots shall be considered a single parcel under the terms of this ordinance.").

7. St. Croix County adopted its ordinance subsequent to a series of legal developments at the federal, state, and county levels to protect the Lower St. Croix River. *See* Br. for Resp't St. Croix Cty. at 4–10. While the ordinance has been amended and updated in the decades since, the treatment of commonly owned, contiguous, substandard lots as a single lot has not changed. *See id.* at 9 n.3.

STATEMENT OF RELEVANT FACTS

1. Petitioners urge this Court to decide a broad question of constitutional interpretation. But in so doing they elide two critical facts. First, this case can be—and, in fact, has been—decided entirely under Wisconsin's applicable statute of limitations. Second, Petitioners never took the steps necessary to make the constitutional takings question presented in this case ripe for adjudication.

2. William and Margaret Murr ("the Murrs"), parents of Petitioners, purchased two adjacent lots along the Lower St. Croix River in the early 1960s. Br. for Resp't St. Croix Cty. at 10. The Murrs built a cabin on the eastern lot ("Lot F"), and transferred title to both that lot and the cabin to their family plumbing business. *Id.* at 11. Title to the western lot ("Lot E"), which they did not develop, remained in their names.

Though neither Petitioners nor the courts below recognized this potentially material fact, in 1982, the Murrs reclaimed title to Lot F from the family business. *Id.* at 11 & n.5. This was the first time Lots E and F came under common ownership subsequent to St. Croix County's adoption of the Lower St. Croix Riverway Overlay District.

In 1994 and 1995, the Murrs transferred title to Lots E and F to their six children.[2] Pet'rs' App. A3, ¶5. Two of the children subsequently quitclaimed their interests in the property to their siblings, leaving Petitioners as the owners of record. *Id.* A3 n.3.

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[2] Given that the lots were under common ownership as of 1982, it should not have been possible to transfer ownership of the lots separately in 1994 and 1995. Recordation of the separate transfers appears to have been an administrative error.

3. In 2004, Petitioners approached St. Croix County zoning officials about the possibility of expanding and flood-proofing the cabin on Lot F. Br. for Resp't St. Croix Cty. at 13. In December 2004, Petitioners filed a land use permit application with the St. Croix County Planning and Zoning Department. *See* Dep. Tr. of Donna Murr at 40:14–41:5 (Certified R. Docket No. 22, pp. 61–62); Dep. Tr. of Peggy Murr Heaver at 24:18–25:5 (Certified R. Docket No. 22, pp. 146–47); Dep. Tr. of Keith Heaver at 13:3–23 (Certified R. Docket No. 22, p. 118). The County responded with a detailed letter advising Petitioners that the property is subject to zoning regulations for several overlay districts, including the Lower St. Croix Riverway Overlay District. *See* Dep. Tr. of Donna Murr at 48:7–50:6 (Certified R. Docket No. 22, pp. 63–64); Dep. Tr. of Peggy Murr Heaver at 24:6–17 (Certified R. Docket No. 22, p. 146).

Over the next thirteen months, Petitioners carried on an extended dialogue with County zoning officials, as well as officials from the Town of Troy and the Wisconsin Department of Natural Resources ("DNR"). Repeatedly during these discussions, County zoning staff communicated to Petitioners that the legal standard for obtaining a variance from applicable zoning regulations would be difficult to meet and that Petitioners had several options for conforming uses of the property. *See* Dep. Tr. of Donna Murr at 66:21–77:11 (Certified R. Docket No. 22, pp. 68–71); Dep. Tr. of Peggy Murr Heaver at 29:4–20 (Certified R. Docket No. 22, p. 148).

4. In February 2006, Petitioners applied to the St. Croix County Planning and Zoning Department for six zoning variances and one special exception. Br. for Resp't St. Croix Cty. at 14. None of Petitioners' requests sought

permission to sell Lot E separately from Lot F. *Id.* at 14 n.7; Resp't's App. F1–2. County zoning staff evaluated Petitioners' seven requests at length. Resp't's App. F3–28. They also invited feedback on Petitioners' applications from the Town of Troy, the St. Croix County Land and Water Conservation Department, the DNR (which exercises regulatory supervision of land management along the Lower St. Croix River), and FEMA (which insures homes, including Petitioners' cabin, within the floodplain of the Lower Saint Croix River). *Id.* F8–9. Based upon review of Petitioners' applications, discussions with Petitioners, a site visit to the property, consultation with other regulatory agencies, and extensive findings, County zoning staff recommended denial of Petitioners' applications. *Id.* F28–33.

The St. Croix County Board of Adjustment scheduled a hearing on Petitioners' applications for the Board's March 23, 2006 meeting. *Id.* F1. After reviewing the County staff recommendations, Petitioners voluntarily withdrew their applications before the scheduled hearing. *See* Dep. Tr. of Peggy Murr Heaver at 21:11–23:13 (Certified R. Docket No. 22, p. 146).

5. Petitioners subsequently renewed five of their applications and submitted three more, placing requests for six variances and two special exceptions before the Board of Adjustment. Br. for Resp't St. Croix Cty. at 14–15 & n.8. A new variance application submitted by Petitioners, sought, for the first time, permission to sell Lot E separately from Lot F. *Id.* at 14–15 & n.7. County zoning staff again evaluated Petitioners' requests in detail and again sought input from other interested regulatory authorities. J.A. 63–73. Both the St. Croix County Land and Water Conservation Department and the DNR

recommended denial of Petitioners' applications. *Id.* 64. FEMA received copies of Petitioners' applications but did not provide the County with comments or a recommendation. *Id.* The Town of Troy Planning Commission supported the applications to flood-proof the cabin but sought to postpone any decision "on the use of contiguous substandard lots in common ownership." *Id.* The Board of Adjustment denied Petitioners' applications. *Id.* 61–73.

6. Petitioner Donna Murr sought certiorari review of the Board of Adjustment decision in the Wisconsin courts. The trial court affirmed the Board of Adjustment's denial of the variance to allow separate development or sale of Lots E and F but reversed the denial of Petitioners' other requests. Resp't's App. B1–7. On appeal, the Wisconsin Court of Appeals affirmed the Board of Adjustment's decision in all respects. *Id.* A1–15. The Wisconsin Supreme Court denied Donna Murr's petition for review. *Murr v. St. Croix Cty. Bd. of Adjustment*, 335 Wis. 2d 146, 803 N.W.2d 849 (2011).

7. While Donna Murr's certiorari suit was proceeding through the Wisconsin courts, County zoning staff and others continued to work with Petitioners to identify a plan that would allow Petitioners to flood-proof their cabin within parameters acceptable to all relevant zoning authorities. *See* Dep. Tr. of Donna Murr at 56:24–57:5, 59:20–60:9, 101:8–15 (Certified R. Docket No. 22, pp. 65–66, 77); Dep. Tr. of Peggy Murr Heaver at 34:14–35:3, 43:22–47:13 (Certified R. Docket No. 22, pp. 149, 151–52); Dep. Tr. of Keith Heaver at 18:4–19:7 (Certified R. Docket No. 22, p. 119). As late as spring 2011, the parties were meeting to discuss options, and Petitioners asserted that they would be submitting "a specific plan" for the cabin to the County zoning staff for evaluation. Dep. Tr. of Peggy Murr Heaver

at 46:11–47:13 (Certified R. Docket No. 22, p. 152). Petitioners never followed through by submitting a plan.

8. Instead, Petitioners filed this suit against St. Croix County and the State of Wisconsin. They alleged that County ordinances and DNR regulations "deprive[d them] of all, or practically all of the use of Lot E because the lot cannot be sold or developed as a separate lot." J.A. 9.

9. Following discovery, St. Croix County and the State of Wisconsin moved for summary judgment. They identified four alternative grounds on which summary judgment was appropriate: (1) Petitioners' claim was time-barred under the applicable Wisconsin statute of limitations; (2) the case was not ripe for adjudication because Petitioners had not exhausted their administrative remedies; (3) Petitioners had no cognizable property right in Lot E separate from Lot F because the ordinance considered them as one property; and (4) Petitioners could not demonstrate a regulatory taking because they had not been deprived of all or substantially all of the beneficial use and value of their property. Pet'rs' App. A5–6, ¶9.

The trial court granted summary judgment in favor of the County and the State. It based judgment on two independent grounds. First, the trial court held Petitioners' claim untimely under Wisconsin Statute section 893.93(1)(a). *Id.* A6, ¶10; *id.* B7. Second, "[d]espite this conclusion, the court also reached the merits" and held there was no taking. *Id.* A6, ¶10; *see also id.* B9. The trial court did not acknowledge—much less adjudicate—the arguments about ripeness and lack of a cognizable property right after merger. *Id.* B1–10.

10. On appeal, the Wisconsin Court of Appeals affirmed the grant of summary judgment. *Id.* A2, ¶1. It did

so in an unpublished, per curiam opinion that has neither precedential nor even persuasive value as a matter of Wisconsin law. *See* WIS. STAT. § 809.23(3) (2013–2014). The Court of Appeals concluded that Petitioners' "takings claim fails on its merits as a matter of law." Pet'rs' App. A7, ¶12. That court opted not to "reach the issue of whether their claim was timely filed," preferring to "assume, without deciding, that it was." *Id.*

The Wisconsin Supreme Court denied review. *Id.* C2. This Court granted certiorari. *Murr v. Wisconsin*, 136 S. Ct. 890 (2016).

SUMMARY OF ARGUMENT

Petitioners ask this Court to review a procedurally improper, non-precedential opinion from an intermediate state court. The lower courts did not consider—based on a mistaken assumption about when Lots E and F first came under common ownership—a potentially material fact that could only have strengthened the trial court's conclusion that this case was time-barred. The Wisconsin Supreme Court declined Petitioners' request for review. And no court has even considered the threshold argument that the case is not ripe for adjudication. All of these factors point to the conclusion that this Court should decline to reach the question Petitioners have posed.

Constitutional adjudication is unnecessary here, as this case can be—and indeed has been—resolved on nonconstitutional grounds. Thus, both the long-established rule of constitutional avoidance and the ripeness doctrine announced in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), militate against answering the consti-

tutional question Petitioners have presented here. Instead, this Court should dispose of the case on other grounds.

Adhering to prudential procedural rules would preserve the constitutional question for another day, when it is presented by a proper vehicle. This approach would demonstrate "sound judicial administration," *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 142 (1946), in keeping with "[t]he best teaching of this Court's experience," *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (quoting *Parker v. Cty. of L.A.*, 338 U.S. 327, 333 (1949)). It would also honor the fundamental principles of federalism and comity, by ensuring that administrative procedures are exhausted and Wisconsin courts construe relevant state and local laws before this Court considers breaking new ground in constitutional interpretation. Moreover, by declining to reach Petitioners' constitutional question before it is ripe, this Court would safeguard the careful balance Wisconsin law has struck between a democratic preference for local decision-making and respect for property owners' constitutional rights.

ARGUMENT

I. THE COURT SHOULD NOT REACH THE CONSTITUTIONAL QUESTION PRESSED BY PETITIONERS.

This Court wades into the waters of constitutional adjudication only when necessary. Here, the parties' dispute can be—and has been—resolved on state-law grounds that do not require novel constitutional construction. Those grounds and the Court's settled practice of constitutional avoidance weigh against deciding the broad and contentious constitutional question posed by

Petitioners. Prudence counsels disposing of this case on other grounds and reserving the takings question for a future day.

A. The Rule Of Constitutional Avoidance Holds That Constitutional Decisions Should Be Reached Only When Necessary.

It is a "cardinal rule" of this Court to decide constitutional issues only where necessary. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501–02 (1985) (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)). This "fundamental rule of judicial restraint," *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984), "conceived out of considerations of sound judicial administration," *Alma Motor Co.*, 329 U.S. at 142, comprises "[t]he best teaching of this Court's experience," *Poe*, 367 U.S. at 503 (quoting *Parker*, 338 U.S. at 333).

1. The rule of constitutional avoidance is established by consistent, settled practice in this Court.

The rule of constitutional avoidance dates back to Chief Justice John Marshall's holding, while riding circuit, that constitutional decisions should be rendered only "[i]f they become indispensably necessary to the case" and must be avoided "if the case may be determined on other points." *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833). Indeed, the Court's "*duty to avoid* constitutional issues that need not be resolved in order to determine the rights of the parties" stands "equally strong" as the Court's "*duty to decide* constitutional questions when necessary to dispose of the litigation before [it]." *Cty. Ct. of Ulster Cty., N.Y. v. Allen*, 442 U.S. 140, 154 (1979) (emphases added).

Justice Brandeis famously articulated the rule of constitutional avoidance in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The Court deemed constitutional the government's actions at issue in the case. *Id.* at 339–40. In concurrence, Justice Brandeis expressed doubt that the Court should have decided constitutionality when other dispositive grounds were present. *Id.* at 341–56. In addition to respect for "long-established practice," Justice Brandeis cited "[c]onsiderations of propriety" as militating against unnecessary constitutional adjudication. *Id.* at 341 (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)). Justice Brandeis prescribed constitutional avoidance even in cases where "it would be convenient for the parties and the public to have promptly decided" a constitutional question. *Id.* at 345.

Justice Brandeis proffered seven prudential rules—followed in the eighty years since—to help the Court "avoid[] passing upon a large part of all the constitutional questions" brought before it. *Id.* at 346. Among those:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

Id. at 347 (internal citations omitted). The rule derived from Justice Brandeis's *Ashwander* opinion has guided this Court's consideration in scores of cases since. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014); *Dep't*

of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343–44 (1999); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660, 669–74 (1988) ("*Smith I*"); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 211–12 (1960); *Alma Motor Co.*, 329 U.S. at 142.

At its core, the rule of constitutional avoidance requires the Court to exhaust all nonconstitutional grounds for decision "prior to reaching any constitutional questions." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). The rule not only functions as a "corollary offshoot of" Article III's case or controversy requirement, *Minnick v. Cal. Dep't of Corr.*, 452 U.S. 105, 123 n.30 (1981) (quoting *Rescue Army v. Mun. Ct. of L.A.*, 331 U.S. 549, 570 (1947)), but also "carries a special weight in maintaining proper harmony in federal-state relations," *Clay*, 363 U.S. at 211–12. In light of all the precedent considered above, "it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond*, 134 S. Ct. at 2087 (internal quotation marks omitted).

2. The rule of constitutional avoidance applies even where lower courts have focused on constitutional issues.

The archetypal case for constitutional avoidance is one where there are two fully developed, legally independent rationales available—one rooted in constitutional argument and one based on some other legal authority. *See, e.g., Gulf Oil*, 452 U.S. at 89. But the rule of constitutional avoidance applies with equal force where, for any of a number of reasons, the constitutional issue is fully developed but need not be decided because some

nonconstitutional basis may dispose of the case. Thus, where it is unclear whether a lower court ruling is based on state law or the federal Constitution, this Court has remanded to avoid an unnecessary constitutional decision. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294–95 (1982). Likewise, where further proceedings can clarify the legality of the conduct at issue and may render constitutional arguments superfluous, this Court has found "no need to address the constitutional issue" and remanded. *Jean v. Nelson*, 472 U.S. 846, 854–55, 857 (1985). And, when lower courts adjudicate constitutional questions without first answering potentially dispositive statutory questions, this Court remands for analysis of the nonconstitutional issues. *See, e.g., Clay*, 363 U.S. at 209–10, 212.

This Court has recognized, and even embraced, that remands for full exploration of nonconstitutional arguments leave the door open for a case to return under circumstances in which the Court could "discharge [its] responsibilities free of concern that [it] may be unnecessarily reaching out to decide a novel constitutional question." *Aladdin's Castle*, 455 U.S. at 295. For example, in *Smith I*, this Court declined to resolve a constitutional question where a ruling on a preliminary state-law issue had the potential to obviate constitutional adjudication. 485 U.S. at 664–74. *Smith I* asked whether the Free Exercise Clause allowed a state to deny unemployment benefits to someone fired for ingesting peyote during a religious ceremony. *Id.* at 661–62. The Oregon Supreme Court found no First Amendment violation. *Id.* at 664–67. This Court determined that the necessity of answering the question depended on the legality under Oregon state law of ingesting peyote. *Id.* at 669–74. The Court thus remanded to the Oregon Supreme Court for further

consideration, noting that a ruling on the preliminary issue of state law could obviate the First Amendment question. *Id.* at 674.

On remand, the Oregon Supreme Court held that "religiously inspired use of peyote fell within the prohibition of the Oregon statute." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 876 (1990) ("*Smith II*") (internal citation omitted). Because that determination brought the constitutional issue unavoidably to the fore, this Court granted certiorari a second time, ultimately holding that the Free Exercise Clause permits a state to deny unemployment compensation to someone fired for ingesting peyote during a religious ceremony. *Id.* at 890.

The Court's actions in *Smith I* did not preclude a decision on the constitutional question *at some point*; rather, *Smith I* was an exercise in "sound judicial administration," *Alma Motor Co.*, 329 U.S. at 142, in line with the Court's "duty to avoid constitutional issues that need not be resolved," *Allen*, 442 U.S. at 154. Once constitutional adjudication became unavoidable in *Smith II*, however, the Court properly discharged its "duty to decide constitutional questions when necessary to dispose of the litigation." *Id.*

To be sure, this Court has strayed from constitutional avoidance. In *Zobrest v. Catalina Foothills School District*, the majority held that "the prudential rule of avoiding constitutional questions ha[d] no application," because in both the trial court and the appellate court, "the parties chose to litigate the case on the federal constitutional issues alone." 509 U.S. 1, 7–8 (1993). "The fact that there may be buried in the record a nonconstitutional ground for

decision," the majority held, "is not by itself enough to invoke" constitutional avoidance. *Id.* at 8.

Four Justices dissented in *Zobrest*, condemning the majority for "blithely" shrugging off "longstanding principles of constitutional adjudication" and "unnecessarily address[ing] an important constitutional issue." *Id.* at 14, 16 (Blackmun, J., dissenting). "The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a 'self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies.'" *Id.* at 16 (quoting *Aladdin's Castle*, 455 U.S. at 294). The dissent explained that the rule of constitutional avoidance serves "to protect not parties but the law and the adjudicatory process." *Id.*

Broadly applied, the approach of the *Zobrest* majority would grant parties and lower courts an alarming ability to hijack the issues presented in a case and push this Court into unnecessary constitutional adjudications simply by confining their focus below to constitutional issues. Perhaps recognizing this danger, cases since *Zobrest* have hewn tightly to the prudential rule of constitutional avoidance. *See, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999) (describing the Court's practice of not "reach[ing] out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground"); *Dep't of Commerce*, 525 U.S. at 343–44.

This Court's recent decisions have reinforced the already sturdy foundation upon which the rule of constitutional avoidance stands. *See, e.g.*, *Bond*, 134 S. Ct. at 2087; *Nw. Austin Mun. Util. Dist. No. One v. Holder*,

557 U.S. 193, 205 (2009); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 744–45 (2010) (Breyer, J., concurring in part and concurring in the judgment); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). The rationale used by the *Zobrest* majority to stiff-arm the rule of constitutional avoidance has not been repeated—or even cited—by this Court since. *Zobrest* stands as a singular deviation from an otherwise unquestioned "cardinal rule," *Brockett*, 472 U.S. at 501–02, based upon "[t]he best teaching of this Court's experience," *Poe*, 367 U.S. at 503 (quoting *Parker*, 338 U.S. at 333).

B. The Wisconsin Court Of Appeals Failed To Explore Potentially Dispositive Nonconstitutional Arguments, Bringing This Case Squarely Within The Rule Of Constitutional Avoidance.

The Wisconsin Court of Appeals was presented with two issues: first, whether the statute of limitations barred Petitioners' suit; second, if Petitioners' suit was timely, whether they suffered a regulatory taking. Pet'rs' App. A7, ¶12. The Court of Appeals improperly analyzed these questions in reverse, concluding that Petitioners' "takings claim fails on its merits as a matter of law," and "[a]ccordingly, we do not reach the issue of whether their claim was timely filed." *Id.* A7, ¶12.

Presented with two grounds for decision—the first statutory, the second constitutional—the Court of Appeals chose to consider only the constitutional one. This recalls *Clay*, where this Court remanded because the Fifth Circuit "apparently found it easier to decide the constitutional question that would be presented only if the [state] statute did apply," 363 U.S. at 209, and *Smith I*, where this Court remanded because the Oregon courts had skipped over a

key threshold question of state law, 485 U.S. at 674. The rule of constitutional avoidance that dictated the outcome in both of those cases applies with equal force here.

By considering only the takings issue, the Court of Appeals violated the Wisconsin courts' rule of constitutional avoidance.[3] It failed to consider, much less exhaust, nonconstituonal grounds for decision. In doing so, it unnecessarily opined about the "parcel as a whole" concept. Pet'rs' App. A9–13, ¶¶17–22. At a minimum, the Court of Appeals should have fully explored and decided the statute of limitations question before entertaining the constitutional takings question.

Neither the Wisconsin Court of Appeals decision nor Petitioners' framing of the case changes the fact that this Court should not decide the constitutional issue presced here. Doing so would violate the Court's "deeply rooted" rule of constitutional avoidance. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The takings question never arises if Petitioners' suit is barred by the statute of limitations, as the trial court in fact held. Pet'rs' App. B7. "[S]ound judicial administration" thus counsels that Wisconsin courts should apply the state-law statute of limitations before this Court reaches out to make an unnecessary constitutional ruling. *Alma Motor Co.*, 329

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[3] Like this Court, Wisconsin courts follow a rule of constitutional avoidance developed through case law. *See, e.g., Waters ex rel. Skow v. Pertzborn*, 2001 WI 62, ¶ 14, 243 Wis. 2d 703, 627 N.W.2d 497 ("When a case may be resolved on non-constitutional grounds, we need not reach constitutional questions."); *Miesen v. State Dep't of Transp.*, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) ("[W]e should decide cases on the narrowest possible grounds and should not reach constitutional issues if we can dispose of the appeal on other grounds.").

U.S. at 142. On the other hand, if the Wisconsin courts determine that Petitioners' suit was timely (and that no other state-law ground raised below is dispositive), then constitutional adjudication may become "unavoidable." *Spector Motor Serv.*, 323 U.S. at 105. Only at that point should this Court consider an important issue of Fifth Amendment law in this case.[4]

C. The trial court's unrebutted analysis shows that this case can be disposed of on independent and adequate state-law grounds.

"This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)) (emphases in original). The independent-and-adequate doctrine "applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. The state-law ground must be independent, meaning "free of entanglement with the federal question," and it must be adequate, meaning

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[4] Even were *Zobrest* a viable exception to the rule of constitutional avoidance—and it is not—the rationale of that case is inapplicable here. Unlike in *Zobrest*, the parties here argued nonconstitutional grounds before both the trial court and the Court of Appeals. *Compare Zobrest*, 509 U.S. at 7–8, *with* Pet'rs' App. A7, B7. Here, the trial court even *ruled* that the statute of limitations foreclosed the petitioners' suit. *Id.* B7. The *Zobrest* Court stated that "[t]he fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke" the prudential rule of constitutional avoidance. 509 U.S. at 8. Here, by contrast, the non-constitutional ground is not buried in the record but occupies multiple pages of the trial court's opinion. Pet'rs' App. B6–7.

capable of fully supporting the judgment without reference to federal law. STEPHEN M. SHAPIRO, *ET AL.*, SUPREME COURT PRACTICE 209 (10th ed. 2013). In divining the basis for a judgment below, the Court has looked beyond the opinions on appeal, reviewing trial court opinions, *see Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 372 U.S. 714, 718 (1963); *see also Barr v. Matteo*, 355 U.S. 171, 173 (1957), as well as pleadings and other court papers, *see Staub v. City of Baxley*, 355 U.S. 313, 318 (1958); *First Nat'l Bank v. Anderson*, 269 U.S. 341, 346 (1926).[5]

Here, the trial court held that Petitioners' "claim is barred by the applicable six year statute of limitations." Pet'rs' App. B7. That statute, Wisconsin Statutes section 893.93(1)(a) (2013–2014), is an independent state-law ground, free of entanglement with the federal takings question. It is also an adequate ground, capable of fully supporting the judgment below. It remains unclear why, having declared Petitioners' claim untimely, the trial court proceeded to consider the merits.[6] Even less clear is why the Court of Appeals sidestepped the statute of limitations entirely. *See* Pet'rs' App. A7–8, ¶12. Regardless, the statute of limitations issue was decided the only time it was addressed, and that decision was—and is—sufficient to resolve the case on nonconstitutional grounds.

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[5] Analogously, in habeas proceedings where the final state-court opinion is silent on a particular issue, this Court "looks through" that opinion and reviews the "last reasoned state-court opinion" examining the issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 & n.3 (1991).

[6] The Court of Appeals recognized the irregularity of the trial court's actions, stating that "[d]espite this conclusion [that the statute of limitations barred the petitioners' claim], the court also reached the merits." Pet'rs' App. A6, ¶10.

As a safeguard, this Court "insist[s] that the nonfederal ground of decision have fair support," *Stop the Beach*, 560 U.S. at 725 (internal quotation marks omitted), so that the independent-and-adequate doctrine does not become "a mere device to prevent a review of the decision upon the Federal question," *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). This prevents reliance on "unfounded" or "essentially arbitrary" state grounds as a means of evading adjudication of the federal question. *Id.* But the safeguard applies here in reverse. Just as an untenable state-law analysis cannot justify this Court declining to review a properly presented federal question, the Wisconsin Court of Appeals' deliberate evasion of the statute of limitations issue cannot provide a basis for moving ahead with adjudication of a contested and important constitutional question that likely need not be reached at all.[7]

In light of the rule of constitutional avoidance and the presence of a potentially independent and adequate state-law ground for decision, this Court should defer decision of the constitutional issue pressed by Petitioners.

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[7] Nor does the presumption of inadequacy introduced in *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983), apply in this case. The Court of Appeals was initially presented with two issues: whether the statute of limitations barred this suit, and whether Petitioners suffered a regulatory taking. Although the Court of Appeals apparently believed federal law mandated the outcome *with respect to the constitutional issue*, it cannot be said that that court thought federal law required it to *choose to take up that issue* prior to deciding a potentially dispositive state-law ground for decision. Thus, there is no basis to presume that the Court of Appeals believed the statute of limitations issue was inadequate to resolve this case.

II. PETITIONERS' CONSTITUTIONAL CLAIM IS NOT RIPE FOR ADJUDICATION.

This Court has repeatedly held that "an essential prerequisite" to a regulatory takings action "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986). This is necessarily true because "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.*; *accord, e.g., Williamson Cty.*, 473 U.S. at 186 ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). This ripeness doctrine remains a cornerstone of takings jurisprudence.[8] Wisconsin state courts have acknowledged and followed the doctrine. *See, e.g., Eberle v. Dane Cty. Bd. of Adjustment*, 227 Wis. 2d 609, 635–39, 595 N.W.2d 730 (1999); *Hoepker v. City of Madison Plan Comm'n*, 209 Wis. 2d 633, 651–53, 563 N.W.2d 145 (1997).

Failing to approve or rejecting a particular development plan is not necessarily a "final decision" reviewable by this Court. *Williamson Cty.*, 473 U.S. at 194. In *Yolo County*, for example, the fact that a developer had "submitted one subdivision proposal and [had] received the Board's response thereto" did not, by itself, mean that a "final

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[8] Earlier this year, in *Arrigoni Enterprises, LLC v. Town of Durham, Connecticut*, 136 S. Ct. 1409 (2016), the Court denied certiorari where the petition expressly invited reconsideration of the ripeness doctrine set forth in *Williamson County* and *Yolo County*.

decision" had been rendered. 477 U.S. at 348–52. Because the developer had not submitted other, less intrusive proposals, there remained a "possibility that some development [would] be permitted." *Id.* at 352. Thus, the ripeness of a takings claim "depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001). Only "once it becomes clear" that the authority lacks further discretion to permit development does a takings claim ripen sufficiently for litigation. *Id.* at 620. To determine whether a landowner followed "reasonable and necessary steps" and allowed the land use authority the opportunity to fully exercise its regulatory discretion, the Court examines the record. *See id.* at 618–26; *Williamson Cty.*, 473 U.S. at 188–90.

Here, the record is incontrovertible. Petitioners filed this takings lawsuit before they exhausted all "reasonable and necessary steps" that would "allow regulatory agencies to exercise their full discretion" with respect to efforts to flood-proof Petitioners' cabin and comply with the overlapping zoning regulations applicable to the property. *Palazzolo*, 533 U.S. at 620–21. Leading up to the St. Croix County Board of Adjustment's denial of the variance application to use Lots E and F separately, County zoning officials were in dialogue with Petitioners for more than eighteen months, from late-2004 through June 2006. *See* Br. for Resp't St. Croix Cty. at 13–15; Dep. Tr. of Peggy Murr Heaver at 26:4–15, 34:14–41:21 (Certified R. Docket No. 22, pp. 147, 149–51). Throughout those conversations, County officials repeatedly identified and suggested alternative development plans to Petitioners. *See* Dep. Tr. of

Donna Murr at 66:21–77:11 (Certified R. Docket No. 22, pp. 68–71); Dep. Tr. of Peggy Murr Heaver at 29:4–20 (Certified R. Docket No. 22, p. 148). Petitioners never pursued those alternatives. Indeed, several years after the Board of Adjustment decision at issue here and shortly before filing this lawsuit, Petitioners indicated to County officials that they would be submitting a new development plan for regulatory consideration. *See* Dep. Tr. of Peggy Murr Heaver at 46:11–47:13 (Certified R. Docket No. 22, p. 152). They never did. In deposition testimony, Petitioner Peggy Murr Heaver explained that Petitioners "still want to pursue these [other development options outlined by the County] at some point in time. It's just that we are in the process of the doing the taking." *Id.* at 47:11–13 (Certified R. Docket No. 22, p. 152).

In the absence of the promised 2011 plan—or any other attempt to gain regulatory approval for use of their property—Petitioners' takings claim is not ripe. Respondents briefed this argument thoroughly at the summary judgment stage. *See* St. Croix Cty.'s Br. in Supp. of Its Mot. for Summ. J. at 14–18 (Certified R. Docket No. 16, pp. 14–18); St. Croix Cty.'s Reply Br. in Further Supp. of Its Mot. for Summ. J. at 4–6 (Certified R. Docket No. 23, pp. 4–6); Def. State of Wis.'s Reply Br. in Supp. of Mot. for Summ. J. at 9–10 (Certified R. Docket No. 28, pp. 9–10). The trial court did not address the ripeness issue, having granted summary judgment on the basis that the suit was time-barred. Pet'rs' App. B1–10. Nor did the Court of Appeals address the issue, since it had not been ruled upon below. *Id.* A7, ¶12. But the fact remains that Petitioners' claim is not ripe and that, because Petitioners failed to take further steps to define "how far the regulation[s] go[]" with respect to their property, *Yolo Cty.*, 477 U.S. at 348, there is no basis for deciding whether a

regulatory taking has occurred. The absence of such a basis militates against this Court reaching the merits of Petitioners' claims.

The fact that the ripeness issue was not addressed below does not mean this Court should not base its decision on ripeness. Indeed, in both *Williamson County* and *Yolo County*, ripeness was first addressed by this Court. *Williamson Cty.*, 473 U.S. at 182–85; *Yolo Cty.*, 477 U.S. at 345–48. Furthermore, if this Court has any doubts about the ripeness analysis, the issue should first be considered in the Wisconsin courts. *See, e.g.*, *Ford Motor Co. v. United States*, 134 S. Ct. 510, 510–11 (2013) (per curiam) ("This Court is one of final review, not of first view." (internal quotation marks omitted)).

There is, admittedly, a tension between the statute of limitations argument accepted by the trial court and the ripeness argument. Nonetheless, such a tension is acceptable between arguments presented in the alternative and should be resolved in the first instance by the Wisconsin courts. For this Court to resolve this question—through its own analysis of the applicable Wisconsin statute of limitations or by unfounded assumptions about what the Wisconsin courts would conclude in conducting their own adjudication—would violate fundamental principles of federalism and comity. And to set aside the ripeness doctrine would not only contravene this Court's precedents on ripeness, but also disregard and disrespect the crucial role that local governments play in land use decisions under Wisconsin law.

III. THIS COURT HAS SEVERAL PROCEDURAL OPTIONS THAT DO NOT REQUIRE DECIDING THE CONSTITUTIONAL QUESTION PRESSED BY PETITIONERS.

In this case, the Court can choose among three exits from the freeway of constitutional adjudication. Each option ensures that the Court does not "pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv.*, 323 U.S. at 105.

First, the Court can dismiss the writ of certiorari as improvidently granted, either with or without opinion. *E.g.*, *Madigan v. Levin*, 134 S. Ct. 2 (2013); *Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003) (Stevens, J., concurring in dismissal of writ of certiorari as improvidently granted) (quoting *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring)); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). Dismissal here would leave the Wisconsin Court of Appeals decision in place. That opinion is unpublished and therefore non-precedential. WIS. STAT. § 809.23(3)(a). Further, because it is a per curiam opinion, it cannot be cited even for persuasive value. *Id.* § 809.23(3)(b). The opinion is, for all intents and purposes, a dead letter with respect to anyone other than the parties. Dismissal would, therefore, not perpetuate the Court of Appeals' constitutional analysis. It would, instead, preserve the constitutional question pressed by Petitioners until a proper vehicle for its resolution comes along.

Second, the Court can remand the case to the Wisconsin courts for adjudication of the statute of limitations question and/or the ripeness issue. *See* 28 U.S.C. § 2106 (2014); 36 C.J.S. FEDERAL COURTS §§ 366, 368. When relying on the rule of constitutional avoidance, this Court often vacates and remands for further

proceedings consistent—or at least "not inconsistent"—with its opinion. In *Smith I*, for example, after determining that a ruling on a preliminary state law issue could moot a federal constitutional question, this Court vacated the judgment and remanded the case to the Oregon Supreme Court for further proceedings. 485 U.S. at 674; *accord, e.g.*, *Three Affiliated Tribes*, 467 U.S. at 159; *Clay*, 363 U.S. at 209–10, 212.

If the Wisconsin Court of Appeals (and, potentially, the Wisconsin Supreme Court after it) were to follow the trial court in deeming Petitioners' suit time-barred, that would render constitutional adjudication unnecessary. Of course, if the Wisconsin courts ultimately decided that neither the statute of limitations nor the ripeness doctrine resolved the case and again issued a constitutional ruling, the case could come back to this Court. *See* 18–19, *supra* (discussing *Smith I* and *Smith II*). At that point, unlike now, the Court could "discharge [its] responsibilities free of concern that [it] may be unnecessarily reaching out to decide a novel constitutional question." *Aladdin's Castle*, 455 U.S. at 295.

Third, the Court can certify the statute of limitations question, the ripeness question, or both to the Wisconsin Supreme Court. The Wisconsin Supreme Court is expressly authorized to "answer questions of law certified to it by the supreme court of the United States." WIS. STAT. § 821.01; *cf., e.g.*, *Clay*, 363 U.S. at 212 (discussing the possibility of certifying a state-law question to the state court in a constitutional avoidance case). The Wisconsin Supreme Court has previously accepted certified questions concerning a statute of limitations. *See Doe v. Am. Nat'l Red Cross*, 176 Wis. 2d 610, 612–13, 500 N.W.2d 264 (1993). If this Court were to certify a question, it would

retain jurisdiction pending an answer. *Fiore v. White*, 528 U.S. 23, 29–30 (1999). Were the Wisconsin Supreme Court to hold Petitioners' suit time-barred or unripe, no constitutional adjudication would be needed. On the other hand, if resolution of the certified question(s) did not end the case, this Court could proceed to decide the constitutional issue.

CONCLUSION

The Court should adhere to prudential doctrines and decline to answer the constitutional question pressed by Petitioners, which does not need to be decided here and is unripe for adjudication. Disposing of the case without deciding the question presented would respect and advance the careful balance Wisconsin has struck between individual property rights, on the one hand, and state and local decision-making, on the other.

Respectfully submitted,

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APPENDIX

PROVISIONS OF COUNTY LAND USE ORDINANCES THAT ADDRESS COMBINING COMMONLY OWNED, CONTIGUOUS, SUBSTANDARD LOTS IN WISCONSIN COUNTIES

County	Relevant Ordinance	Nature of Provision	Affected Lots
Adams	Shoreland, Wetland and Habitat Protection Ordinance 6-2.00	Explicit	Shoreland
	Comprehensive Zoning Ordinance 9-3.03	Implicit	All
Ashland	Shoreland Amendatory Ordinance 9.4–9.5	Implicit	Shoreland
Barron	17.17(b)(6)	Implicit	All
Bayfield	§ 13-1-26(d)	Explicit	Shoreland
Brown	22.15(1)–(2)	Implicit	Shoreland
Calumet	82-108(a)	Explicit	All
Clark	22-334(a)(3), (b)	Implicit	Shoreland
Columbia	16-5-32(a)(3), (b)	Implicit	Shoreland
Dodge	10.5.1	Implicit	Residential & Agricultural
	7.3.10	Explicit	All
Door	9.04(1)	Explicit	All
Douglas	Ch. 8.0 § 4.2.5(b)	Explicit	Shoreland
	Ch. 8.4 § 4.32	Explicit	All
Dunn	13.3.7.04	Implicit	All
Eau Claire	18.19.080(B)	Implicit	Shoreland
Florence	Ch. 10 Subch. 1 2.08(E)	Explicit	All
Fond du Lac	44-203(a)–(b)	Implicit	Shoreland
Grant	§ 3.26(1)	Implicit	All
Green Lake	§ 350-22(A)–(B)	Implicit	All
Iowa	400.07 §§ 4.31–4.32	Implicit	Shoreland
Iron	9.5.6(B)	Explicit	All
Jackson	16.04(1)(d)–(e)	Implicit	Shoreland
	17.82(2)	Implicit	All

County	Relevant Ordinance	Nature of Provision	Affected Lots
Jefferson	11.09(e)	Implicit	All
Juneau	Ch. 905.2.3 §§ 3.31–3.32	Implicit	Shoreland
Kenosha	12.28-6	Explicit	All
Kewaunee	4.31–4.32	Implicit	Shoreland
La Crosse	20.231–20.232	Implicit	Shoreland
Lafayette	6-2-4.31, 6-2-4.32	Implicit	Shoreland
Landglade	17.12(6)(a)	Implicit	All
Manitowoc	9.08(5)(a)	Implicit	Shoreland
	8.07, 8.19	Explicit	All
Menominee	22.040(C)(1)–(2)	Implicit	Shoreland
Oconto	14.408(4)(h)	Explicit	All
Outagamie	§ 44-14	Explicit	Shoreland
	§ 54-44(b)	Explicit	All
Ozaukee	§ 7.0304	Implicit	Shoreland
Pepin	16.04(3)(a)–(b)	Implicit	Shoreland
	19.03(2)	Implicit	Mississippi River Bluff
Pierce	§ 240-68(A)	Explicit	All
	§ 239-11(D)	Implicit	St. Croix Riverway
Polk	St. Croix Riverway Ordinance art. H § 4	Implicit	Lower St. Croix Riverway
Racine	Ch. 20 art. 5 § 20-191(d)	Implicit	All
Richland	Ord. No. 2003-16 § I(G)(2)(a)(5)(b)	Explicit	General Commercial & Single Family Residential Districts
Rusk	§ 50-32(e)(2)	Explicit	All
Sauk	8.05(3)(a)–(b)	Implicit	Shoreland
Sawyer	Zoning Ordinance 4.25(2)	Explicit	All
Shawano	Shoreland Zoning Ord. 4.31–4.32	Implicit	Shoreland

County	Relevant Ordinance	Nature of Provision	Affected Lots
St. Croix	Subch. III.V § 17.36(I)(4)(a)	Implicit	Lower St. Croix Riverway
Taylor	31.04(3)(a)–(b)	Implicit	Shoreland
Trempealeau	Shoreland Zoning Ordinance 4.31–4.32	Implicit	Shoreland
	Comprehensive Zoning Ordinance 8.04(1)	Explicit	All
Vernon	Ch. 50 Art. IV § 50-131(c)(1)–(2)	Implicit	Shoreland
Washburn	§ 38-595(1)	Implicit	Shoreland
	§ 38-541	Explicit	All
Washington	23.09(3)(a)	Implicit	Shoreland
Waukesha	Shoreland and Floodland Protective Ordinance § 3(j)(2)(E)	Implicit	Shoreland
	Basic Zoning Ordinance 3.11(2)(E)	Implicit	All
Waupaca	Ch. 34 § 2.05(4)	Explicit	All
Waushara	§ 58-903(c)	Implicit	Shoreland
	Art. V Div. I § 58-823(c)(1)–(2)	Implicit	All

The following counties are not listed above because they do not include in their ordinances a provision for combining commonly owned, contiguous, substandard lots: Buffalo, Burnett, Chippewa, Crawford, Dane, Forest, Green, Lincoln, Marathon, Marinette, Marquette, Milwaukee, Monroe, Oneida, Portage, Price, Rock, Sheboygan, Vilas, Walworth, Winnebago, and Wood.

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JOSEPH P. MURR, ET AL,

Petitioners,

v.

STATE OF WISCONSIN, ET AL.,

Respondents.

On Writ of Certiorari to the State of Wisconsin Court of Appeals

BRIEF OF WISCONSIN REALTORS® ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a regulatory takings case, does the "parcel as a whole" concept as described in *Penn Central Transportation v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly-owned, contiguous parcels, must be combined for takings analysis purposes?

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Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000) 10

INTERESTS OF *AMICUS CURIAE*[1]

The Wisconsin REALTORS® Association ("WRA") is a non-profit, professional trade association of member REALTORS® and affiliates in the State of Wisconsin. The WRA membership consists of approximately 13,500 real estate agents, brokers, developers, and other real estate professionals throughout the state. The WRA represents its members before the Wisconsin Legislature, state regulatory agencies, and federal, state and local courts on a wide range of issues to promote the interests of the real estate industry and property owners throughout Wisconsin, including questions pertaining to the authority of governmental entities to regulate the use, development and transfer of real property. As the state's largest real estate association, the WRA has a direct and active interest in protecting the constitutional rights of property owners, including their Fifth Amendment rights.

In this brief, the WRA offers an additional viewpoint on the error committed by the Wisconsin Court of Appeals. It wrongly concluded that, in a regulatory takings case, the "parcel as a whole" concept described in *Penn Central Transportation v. City of New York*, 438 U.S. 104, 130-31 (1978), establishes a rule that two legally-distinct, but commonly-owned, contiguous

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[1] No counsel for a party authorized this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Counsel of record for all parties received timely notice of amicus curiae's intention to file this brief pursuant to Supreme Court Rule 37.2(a). The parties have consented to the filing of this brief.

parcels must be treated as a single property in a takings analysis.

The WRA and its members have an active interest in the "parcel as a whole doctrine" and its impact on the use, development and sale of adjacent lots. The WRA's members work directly with buyers, sellers and developers of real estate. Vacant lots are common in local real estate markets and are often owned by adjacent property owners, who intend to sell or develop the lots. By requiring contiguous property in common ownership to be combined for purposes of a takings analysis, the Wisconsin Court of Appeals' decision will discourage common ownership of contiguous property, decrease property values, and adversely impact local real estate markets throughout Wisconsin.

SUMMARY OF ARGUMENT

The Wisconsin Court of Appeals ruled that the "parcel as a whole" concept requires all contiguous lots in common ownership to be combined for purposes of a regulatory takings analysis (the "Wisconsin Rule"). This bright-line rule, unreviewed by the state supreme court, is inconsistent with the facts and the holding in *Penn Central* and with this Court's other decisions.

Penn Central involved the proposed segmentation of air rights from a single parcel of land owned in fee simple. This Court rejected the segmentation theory — a single parcel of property cannot be divided into individual property rights for purposes of a takings claim. The Court explained that takings law does not separate an individual parcel of property into discrete segments and, then, evaluate whether the rights in any one segment have been taken. Rather, a takings analysis must focus on all the rights in the "parcel as a whole."

Since *Penn Central*, the Supreme Court has consistently applied the "parcel as a whole" rule in cases involving the segmentation of property into separate property interests. However, the Court has not yet applied the rule to cases involving the combination of individual parcels of land. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). The Wisconsin Court of Appeals' decision squarely presents this issue.

The Wisconsin Rule fails to treat individual parcels of land as separate and distinct pieces of property for takings analysis purposes—an error that brings the Wisconsin court's decision into conflict with basic concepts of "property" as defined in Wisconsin and by this Court. This Court has consistently treated individual parcels of land, and individual rights associated with the land, as property for purposes of the Fifth Amendment. In addition, the Wisconsin Rule is inconsistent with the treatment of individual lots as property by Wisconsin's Subdivision and Platting Law, Wisconsin's Eminent Domain Law, and Wisconsin's Shoreland Zoning Law.

Finally, the Wisconsin Rule will lead to arbitrary and unreasonable results, as well as confusion and unfair treatment of property owners. The financial risks associated with the common ownership of adjacent lots will increase, creating a financial disincentive to purchase adjacent lots that could adversely impact economic development and the real estate market.

I. THE WISCONSIN RULE IS INCONSISTENT WITH *PENN CENTRAL* AND OTHER SUPREME COURT CASES.

The Wisconsin Court of Appeals asserted that the "parcel as a whole" ruling in *Penn Central* requires the adjacent parcels under common ownership to be evaluated as a single property in regulatory takings claims. (Ct. App. ¶¶ 18 and 20) That court's bright-line rule is inconsistent with the facts and holding in *Penn Central* as well as other Supreme Court cases.

A. *Penn Central* Involved The Segmentation Of Air Rights From A Single Parcel Of Land Owned In Fee Simple.

In *Penn Central*, the property owner argued that the New York City Landmark Commission's zoning decision, denying an application to build a 55-story office building above Grand Central Terminal, deprived the property owner of its air rights. 438 U.S. at 118, 130. The property owner claimed the permit denial resulted in a taking, arguing that the right to build in the air space above Grand Central was itself a separate and valuable property right or "stick" in the bundle of rights possessed by fee-simple property owners. *See id.* at 130. The owner's argument attempted to segment "air rights" from the other rights associated with fee-simple ownership of property — the "segmentation theory." Thus, the owner maintained, the Landmark Commission's regulation "goes too far" because it deprived the owner of the entirety of the property's air rights. *Id.*

This Court rejected the segmentation theory. A single parcel of land cannot be segmented into individual property rights for purposes of a takings claim: "'Taking' jurisprudence does not divide a single parcel into discrete segments, and attempt to

determine whether rights in a particular segment have been entirely abrogated." *Id.* Rather, the Court explained, a takings analysis should focus on both "the character of the [government] action" and "the interference with rights in the parcel as a whole." *Id.* at 130-31. This Court further noted that the "parcel as a whole" in that case was a single parcel—the "landmark site." *Id.* at 131.

Moreover, this Court rejected a bright-line test for "determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). Instead, this Court adopted a three-part "balancing test" for regulatory takings cases as part of an "essentially ad hoc, factual inquiry." *Id.* at 124. Thus, whether a regulation produces a taking "depends largely 'upon the particular circumstances [in each] case.'" *Id.* (citations omitted). The Court eschewed a categorical rule in favor of flexibility.

Unlike the facts in the present case, *Penn Central* did not involve the combination of adjacent parcels.[2] And the Court did not suggest that the "parcel as a whole" theory should apply to multiple parcels owned by one person. Rather, the "parcel as a whole" theory in *Penn Central* precluded an effort to divide a single

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[2] In *Lucas v. South Carolina Coastal Council*, this Court noted that the New York Court of Appeals' decision under review in *Penn Central* had "examined the diminution in a particular parcel's value produced by a municipal ordinance in light of [the] total value of the takings claimant's other holdings in the vicinity ...." The Court characterized that view as "an extreme . . . and . . . unsupportable . . . view of the relevant calculus." *Lucas*, 505 U.S. 1003, 1016 n. 7 (1992).

parcel into separate segments of property rights within that parcel. Rightly so. Such segmentation would confound zoning codes and police power regulation of property. Nonetheless, in citing *Penn Central* as the basis for the Wisconsin Rule — requiring adjacent lots in common ownership to be combined in all cases for purposes of a regulatory taking — the Wisconsin Court of Appeals erred.

B. The Supreme Court Has Applied The "Parcel As A Whole" Rule Only To Segmentation Cases.

Since *Penn Central*, the Supreme Court has applied the "parcel as a whole" rule consistently in cases involving the segmentation of property into separate property interests. However, the Court has not applied the rule to cases involving the combination of separate parcels of land.

In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court upheld a federal regulation prohibiting the sale of artifacts made from the parts of protected birds, rejecting the argument that the prohibition on the right to sell the artifacts was a taking of a separate property right. *Id.* at 67-68. The Court stated, "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. Because the bird owners retained other rights associated with the property (e.g., rights to possess, transport, and donate), the Court found no taking.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court reaffirmed the "parcel as a whole" rule as it applied to segmentation theory claims. The property owners argued that Pennsylvania's subsidence protection law constituted

a regulatory taking because it required 27 million tons of coal to remain in the ground. Citing *Penn Central*, this Court rejected the physical segmentation argument, determining that "[t]he 27 million tons of coal do not [themselves] constitute a separate segment of property for takings law purposes." *Id.* at 498. In addition, the Court used the "parcel as a whole" rule to reject another claim by the owners — that the subsidence protection law took the claimants' support estate, which Pennsylvania law recognized as a separate property interest. *Id.* at 500-01. The Court reasoned that the theory of separating the support estate from the rest of the property owner's bundle of rights was flawed since "the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated." *Id.* at 501.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court declared that a 32-month development moratorium was not a *per se* taking because such a ruling would violate the "parcel as a whole" standard. Once again, the Court refused to carve property into distinct segments, explaining that an interest in land is defined by its legal description.

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest . . . Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not.

Id. at 331-32.

While these cases demonstrate that a property owner may not "conceptually sever" the regulatory portion of a parcel by simply "defining the property interest taken in terms of the very regulation being challenged," this Court has yet to apply the "parcel as a whole" rule to adjacent parcels of land. *Tahoe-Sierra*, 535 U.S. at 331. This Court's segmentation cases prevent property owners from *narrowing* the denominator by "conceptually sever[ing]" the regulated portion of the parcel directly impacted by the regulation from the remaining parcel. This case presents the Court with the opportunity to confirm the converse of this rule: the government cannot *enlarge* the denominator by "conceptually merging" the regulated parcel with an adjacent parcel. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

II. THE WISCONSIN RULE CONFLICTS WITH THE *VERY* DEFINITION OF PROPERTY.

A. A Parcel Of Land Is Considered Property For Purposes Of The Takings Clause.

"Property" is defined broadly:

> 1. Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a "bundle of rights." These rights include the right to possess and use, the right to exclude, and the right to transfer. 2. Any external thing over which the rights of possession, use, and enjoyment are exercised ....

Black's Law Dictionary 1410 (10th ed. 2014). More specifically, property has been regarded as "the highest right a man can have to anything; being used

for that right which one ha[s] to lands or tenements, goods or chattels, which no way depends on another man's courtesy." *Jackson v. Housel*, 17 Johns, 281, 283 (N.Y.Sup. Ct. 1820). Early legal scholars defined property as "certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition." 1 John Lewis, *A Treatise on the Law of Eminent Domain In The United States* 52 (3d ed. 1909) (footnote omitted).

Since the earliest days of American jurisprudence, this Court has treated a parcel of land owned in fee simple as property for purposes of the Fifth Amendment's Takings Clause. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (finding a taking after a state dam flooded a parcel of land); *United States v. Lynah*, 188 U.S. 445 (1903) (finding a taking after a river flooded a cotton field); *United States v. Cress*, 243 U.S. 316 (1917) (finding a taking after a dam and lock system flooded a parcel of land). Fee simple is the most complete form of ownership because the owner possesses all rights in the land. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). In takings cases, where the title to a parcel of private land is clearly established, "the only question that remains is whether such property has been taken . . . for public use." *Hill v. United States*, 149 U.S. 593, 600 (1893) (Shiras, J., dissenting).

In evaluating whether the type or interest in property warrants protection under the Fifth Amendment, this Court often uses a parcel of land as the baseline for making the determination. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken

constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council,* 535 U.S. at 322 (internal citations omitted); *see also, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) (citations omitted) (extending the definition of property for purposes of the Fifth Amendment to trade secrets, the Court stated the "general perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land"). As recognized by this Court, "a fee simple interest [in land has] . . . a rich tradition of protection at common law." *Lucas*, 505 U.S. at 1016 n.7.

While consistently treating individual parcels of land owned in fee simple as property for purposes of the Fifth Amendment, this Court also has considered individual rights or "sticks" associated with the land to be property. *See* Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163, 1191 n. 146 (1999) (tracing the use of the "bundle of rights" theory to the late 1800s); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 899 (2000)(explaining that property is often conceived to be a "bundle of rights").

For example, in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), this Court found that the government's imposition of a navigational servitude requiring public access to a pond took the landowner's right to exclude others from the property and constituted a taking. *See also, Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (identifying the right to exclude others as one of the most essential sticks in the bundle of rights); *Lucas*, 505 U.S. at 1044 (1992) (Blackmun, J., dissenting) (recognizing the right to alienate land as a distinct property interest); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (a property owner's bundle of

rights includes the right to possess, dispose and exclude others) (citations omitted).

B. Individual Lots Are Property Under Wisconsin Law.

For purposes of the Fifth Amendment's Takings Clause, this Court has defined "property" by "existing rules or understandings that stem from an independent source such as state law." *Lucas*, 505 U.S. at 1030; *see, e.g., Armstrong*, 364 U.S. at 44, 46 (a materialman's lien is considered property under Maine law); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (a real estate lien is considered property under Kentucky law); *United States v. Craft*, 535 U.S. 274, 288 (2002) (a tax lien is considered property under Michigan law). These state laws define "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors*, 323 U.S. at 378. "[P]roperty rights protected by state law are deserving of the protection of the Taking Clause." *Ruckelshaus*, 467 U.S. at 1003.

1. The Wisconsin Rule Conflicts With Wisconsin's Subdivision And Platting Law Recognizing Individual Lots As Property.

In Wisconsin, like most states, the process for subdividing raw land into individual lots and parcels is a formal process regulated at both the state and local levels.[3] As established by Wisconsin's Subdivision and

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[3] A subdivision plat is required any time a landowner divides a lot, parcel, or tract of land for the purpose of sale or building development, where (1) the division creates five or more parcels of building sites of 1 ½ acres each or less, or (2) successive divisions within a five-year period create five or more parcels or building

Platting Law, the process requires a series of permits, reviews and approvals and is intended to, among other things, "promote the . . . general welfare of the community[] . . . [and] to further the orderly layout and use of land." *See* Wis. Stat. §§ 236.01 and 236.45(1).[4] The review and approval process is multi-faceted, with reviews and/or approvals required for both preliminary[5] and final plats by various state agencies and local governments. *See* Wis. Stat. §§ 236.11 (identifying the process for preliminary plat submittal and review) and 236.12 (identifying the final process for final plat submittal and review). When creating a subdivision, each lot must meet minimum width and area requirements,[6] must be clearly identified and given a separate number on the plat,[7] with all lot lines clearly marked and measured on the plat.[8] In addition, the exterior boundaries of each individual lot must be surveyed and permanently established by monuments.[9]

Once the plat is approved by all state and local authorities, the final plat must be recorded in the office of the register of deeds in the county where the subdivision is located. *See* Wis. Stat. § 236.25(1).

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sites of 1 ½ acres each or less. *See* Wis. Stat. § 236.02(12)(am). For the creation of lots or parcels that do not result in a subdivision, a certified survey map is required. *See* Wis. Stat. §§ 236.03(1) and 236.34(1).

[4] Unless otherwise indicated, all references to the Wisconsin State Statutes will be the 2013-14 version.

[5] Preliminary plats are optional unless required by local ordinance. *See* Wis. Stat. § 236.11(1)(a).

[6] Wis. Stat. § 236.16(1)

[7] Wis. Stat. § 236.20(2)(e)

[8] Wis. Stat. § 236.20(2)(c)

[9] Wis. Stat. § 236.15(1)(c)

When the plat is recorded, each lot "in that plat shall be described by the name of the plat and the lot and block in the plat for all purposes, including those of assessment, taxation, devise, descent and conveyance . . .." Wis. Stat. § 236.28. No plat or subdivision can be approved unless it shows the exterior boundaries of each lot or parcel of the proposed subdivision. Wis. Stat. § 236.20(2)(a).

In other words, each lot, regardless of whether it is contiguous to other lots in common ownership, has a separate and distinct legal identity and has to be identified as such for all purposes. Penalties are imposed for recording plats that fail to meet these requirements, for conveying title to lots without a recorded plat, and for removing or disturbing the monuments used for establishing individual lot boundaries. *See* Wis. Stat. §§ 236.30, 236.31, and 236.32.

Once a subdivision plat has been recorded, creating individual legal lots of record, strict limits are placed on the ability to alter boundaries or to change or vacate any portion of the plat or individual lots. The authority to vacate or alter any part of the subdivision or any legal lot of record is limited to (a) "[t]he owner of the subdivision or any lot in the subdivision," or (b) "[t]he county board if the county has acquired an interest in the subdivision or in any lot in the subdivision by tax deed." Wis. Stat. § 236.40. Unless a county has acquired an interest in a lot by tax deed, a county board may not vacate any portion of a lot in a subdivision. *Id.*

The Wisconsin Supreme Court has recognized that even courts have limited authority to vacate any portion of a subdivision plat once it has been properly recorded. *See In re Vacating Plat of Chiwaukee*, 36 N.W.2d 61, 63 (Wis. 1949) (indicating that courts could

only vacate parts of plats "'dedicated to and accepted by the public for use as a street or highway or as streets or highways'") (citation to statute omitted); *see also* Wis. Stat. § 236.43 (identifying the authority of courts and the process that must be followed to vacate or alter areas in a subdivision that have been dedicated to the public). Emphasizing the rights that each lot owner has when purchasing a legal lot of record, the court stated:

> As those statutes were in effect when the land was platted and when the objectors and their predecessors in title purchased their lots, they are imported as a matter of law into their contracts of purchase, and all of the relative rights and obligations of the parties are subject to the provisions of those statutes, including the manner and conditions under which the portion of the plat involved herein may be vacated.

Chiwaukee, 36 N.W.2d at 63. Vacating or altering the exterior boundaries of any recorded lot or subdivision is considered a "replat" and requires public notice, a judicial hearing, and compliance with the requirements of Chapter 236 of the Wisconsin Statutes. *See* Wis. Stat. §§ 236.02(11), 236.36, 236.41, and 236.42.

Contrary to Wisconsin's Subdivision and Platting Law, which establishes permanent, legal lot lines and boundaries and a specific process for altering those lot lines and boundaries, the Wisconsin Rule effectively erases the common boundary lines between adjacent, individually-platted and recorded lots for the purpose of a regulatory takings analysis. State law recognizes separate and distinct boundaries. The Wisconsin Rule does not.

2. The Wisconsin Rule Conflicts With Wisconsin's Eminent Domain Law Treating Individual, Contiguous Tax Parcels as Property

The Wisconsin Supreme Court has recognized the significance of individual tax parcels. *See, e.g.*, *Spiegelberg v. State of Wisconsin*, 2006 WI 75, ¶ 1, 717 N.W. 2d 641, 643. There, the court endorsed the property owner's approach to just compensation, requiring the effect of a taking to be evaluated separately for adjacent tax parcels, despite their common ownership. *Id.*

The property owner in *Spiegelberg* owned 150 acres of land divided into five contiguous tax parcels, all five of which were used as a farm. *Id.*, ¶ 2. The Wisconsin Department of Transportation ("WisDOT") condemned 11 acres spanning three of the five parcels for a highway project. The WisDOT proposed to pay just compensation based on the effect of the taking on all five parcels collectively. *Id.*, ¶ 15 (summarizing the WisDOT's position as: "if one person owns multiple parcels that are affected by a partial taking, all of the parcels must be valued as though they were one parcel"). The property owner objected and presented appraisal testimony showing the diminution in value was greater when the effects were evaluated on a parcel-by-parcel basis. *Id.*, ¶ 16.

In choosing between these approaches, the Wisconsin Supreme Court defined the issue in the same way as the issue presented by the Petitioners in this case: How should the "whole property" or the "denominator" be defined in a takings case? The court stated:

> The answer to this question turns on whether the "whole property" language of § 32.09(6)[10] requires that contiguous parcels be valued together as a single unit, or whether they can be valued individually with a sum total then calculated for their collective appraised values.

Id., ¶ 10 (footnote added).

The Wisconsin Supreme Court held that the effect of the taking should be evaluated on a parcel-by-parcel basis. *Id.*, ¶¶ 31-32. Thus, rather than adopt a bright-line rule that disregarded property lines, as did the Wisconsin Court of Appeals in this case, the court in *Spiegelberg* adopted a "flexible approach" that takes into consideration "the individual characteristics of each property," while respecting established property lines. *Id.*, ¶ 33.

3. The Wisconsin Rule Conflicts With State And Local Grandfathering Laws.

By requiring contiguous lots under common ownership to be combined for purposes of a takings analysis, the Wisconsin Rule conflicts with state laws and ordinances that protect the development rights of each individual lot, regardless of whether they are contiguous and owned by the same person.

Wisconsin grandfathers substandard lots located in shoreland areas[11] under certain conditions, regardless

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[10] Wis. Stat. § 32.09(6) sets the parameters for just compensation in eminent domain proceedings involving partial takings.

[11] "Shorelands" are defined as all lands within "1,000 feet from a lake pond or flowage; and 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater." *See* Wis. Admin. Code § NR 115.03(8).

of whether they are adjacent to other lots in common ownership. *See* Wis. Stat. § 59.692(2m); *see also* Wis. Admin. Code § NR 115.05. Under the law, a "substandard lot" is defined as "a legally created lot or parcel that met minimum area and minimum average width requirements when created, but does not meet current lot size requirements." *See* Wis. Admin. Code § NR 115.05(1)(a)3.[12] Regardless of changes to minimum lot-size requirements[13] or other local land development regulations, a property owner is entitled to use the substandard lot as a building site if all of the following conditions apply:

> a. The substandard lot or parcel was never reconfigured or combined with another lot or parcel by plat, survey, or consolidation **by the owner** into one property tax parcel.
>
> b. The substandard lot has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.
>
> c. The substandard lot or parcel is developed to comply with all other ordinance requirements.

Id. (emphasis added). In other words, each individual substandard lot can be built upon unless the owner of

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[12] The state's current minimum lot-size requirements in shoreland areas for lots served by public sanitary sewer include a minimum average width of 65 feet and a minimum area of 10,000 square feet. *See* Wis. Admin. Code § NR 115.05(1)(a). Lots not served by public sanitary sewer are required to have a minimum average width of 100 feet and a minimum area of 20,000 square feet. *Id.*

[13] While these lot-size standards are referred to as "minimum standards," counties are prohibited from adopting lot-size standards or other development regulations in shoreland areas that are more restrictive than those standards established in Wis. Admin. Code ch. NR 115. *See* Wis. Stat. § 59.692(1d)(a).

the property has treated the lot as one parcel by either (1) merging the lot with an adjacent lot, or (2) building a structure that straddles both the substandard lot and an adjacent lot. In short, unless the owner has treated the lot as one parcel in either manner, counties are not allowed to prohibit structures from being constructed on substandard lots in shoreland areas.[14] *See* Wis. Stat. § 59.692(2m). These protections apply in unincorporated areas in all 72 counties throughout Wisconsin.[15]

Similar to Wisconsin, other state and local governments have adopted laws that grandfather all lots created before the effective date of any zoning changes. *See* Daniel R. Mandelker, *Land Use Law*, § 9.07, at 9-8 (6th ed. 2015). In Pennsylvania, for example, owners of subdivision lots are protected from future changes to zoning or subdivision regulations relating to lot sizes for five years after a subdivision plat is approved. *See* 53 Pa. Cons. Stat. § 10508(4)(ii); *see also* N.H. Rev. Stat. § 674.39 (2016) (grandfathering lots in a subdivision from future changes in

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[14] The Wisconsin Court of Appeals did not address, nor did the parties raise, the issue of whether the substandard lot provisions in St. Croix County's ordinance and Wis. Admin. Code § NR 118.08(4) are preempted by Wis. Stat. § 59.692(2m) and Wis. Admin. Code § NR 115.05(1)(a)3. The Wisconsin Legislature enacted and then amended Wis. Stat. § 59.692(2m) after St. Croix County denied the Murrs' request to sell one of the two contiguous parcels. *Compare* 2011 Wis. Act 170 (effective April 17, 2012) and 2015 Wis. Act 55 §§ 1922i and 1922j *with Murr v. St. Croix County Bd. Of Adjustment*, 2011 WI App 29, ¶¶ 5-6, 796 N.W.2d 837, 842 (recounting the procedural history of the zoning variances requested by the Murrs). If sub. (2m) had been in effect at the time the Murrs first sought approval to sell the second lot, the result could have been different.

[15] *See* Wis. Stat. § 59.692(1c)(requiring each county to zone all shorelands in unincorporated areas).

subdivision regulations for five years after subdivision plat is recorded). In Connecticut, any residential lot approved as part of a subdivision plan is not required to comply with future changes to local zoning ordinances. *See* Conn. Gen Stat. § 8-26a(b)(1) (2014); *see also* Mass. Gen. Laws ch. 40A, §§ 5 and 6 (2016) (protecting up to three adjoining and commonly-held lots for five years from the date of any changes making the lots nonconforming); Va. Code §§ 15.2-2261(c) and 15.2307 (2015) (protecting the developer from any changes to a subdivision plat for five years after the subdivision plat is approved, and protecting owner of a lot to develop the property under current land-use regulation if the owner relied in good faith on those regulations); *Marinelli v. Bd. of Appeals of Stoughton*, 797 N.E.2d 893 (Mass. 2005)(interpreting Massachusetts' vested rights law to grandfather three lots in common ownership if a party owns four or more lots).

In addition to statutory protections for the development of individual lots, states have common law vested rights doctrines that provide similar protection for lot owners from future changes to lot-size requirements and other development regulations. *See, e.g.*, *Noble Manor Co. v. Pierce County*, 943 P.2d 1378 (Wash. 1997) (finding that Washington's vested rights law protects property owners from changes in minimum lot-size requirements enacted after subdivision plat was submitted for approval); *Morgenstern v. Town of Rye*, 794 A.2d 782 (2002) (finding that New Hampshire's common law vested rights doctrine protects an owner's right to develop a substandard lot).

Wisconsin and other states have statutory and common laws that protect the rights of owners of all individual lots under certain conditions. These laws

do not distinguish between lots based upon contiguity or common ownership with other lots. Rather, each individual lot is treated the same. By treating some lots differently than others for purposes of a regulatory taking claim, the Wisconsin Rule conflicts with these laws.

III. THE WISCONSIN RULE WILL LEAD TO ARBITRARY AND INEQUITABLE RESULTS.

In determining whether individual lots are protected under the Fifth Amendment, the Wisconsin Rule considers only two factors — contiguity and common ownership. By ignoring all other facts and circumstances, the Wisconsin Rule will result in arbitrary and unreasonable regulatory decisions, as well as confusion for and unfair treatment of property owners. Outcomes produced by the Wisconsin Rule are easily found:

- Timing of acquisition. Two contiguous lots owned by the same person and purchased at the same time must be treated the same as two contiguous lots owned by the same person and purchased 20 years apart. *See, e.g., Cane Tennessee, Inc. v. United States*, 60 Fed. Cl. 694, 700-701 (2004) (finding that interests in property held by a common owner should not be aggregated because they were acquired at different times over approximately 18 years).

- Owner's investment-backed expectations. Four contiguous lots owned by the same person — purchased for the purpose of building one residence with large, open-space buffers between neighboring properties — must be treated the same as four contiguous, downtown lots owned by the same person

purchased for the purpose of building separate commercial buildings on each lot. *See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 903 (Fed.Cir.1986), *cert. denied* 479 U.S. 1053 (1987) (finding that the property owner's investment backed expectations to mine limestone deposits on entire 1560-acre parcel were damaged by denial of a permit).

- Existing development on lots. Two contiguous lots owned by the same person must be combined for regulatory takings purpose even if one of the lots is fully developed with a single-family home. *See, e.g., Burke v. Board of Adjustment*, 145 A.2d 790, 793 (N.J. Super. App. Div. 1958) (declaring that two adjacent lots in common ownership should not be merged because one lot had already been developed with a single-family dwelling).

- Treatment by state and local ordinances. Two legal, substandard lots must be combined for regulatory takings purposes despite being "grandfathered" and declared buildable for purposes of residential construction. *See, e.g.*, Wis. Stat. § 59.692(2m) and Wis. Admin. Code § NR 115.05(1)(a)3 (declaring that all substandard lots in the shoreland zone can be used as a building site if the lot (a) was never merged within another lot by the owner, (b) has never been developed with a structure placed partly upon an adjacent lot, and (c) is developed to comply with all other ordinance requirements).

- Number of lots. Two contiguous lots owned by the same person must be treated the same as 100 contiguous lots owned by the same person. *See, e.g., Loveladies Harbor, Inc. v. United*

States, 28 F.3d 1171(Fed. Cir. 1994) (rejecting a claim that the whole parcel should include an entire 250-acre development project with lots that have been sold and developed over more than 40 years).

- Zoning on parcels. Three contiguous lots, each with a different zoning classification (residential, commercial, and agricultural), must be combined for regulatory takings purposes. *See, e.g., Twain Harte Associates, Ltd. v. County of Tuolumne*, 265 Cal.Rptr. 737 (Cal. Ct. App. 1990) (reversing summary judgment on the merger of two differently zoned properties (1.7-acre parcel zoned "open space zoning" and 8.5-acre parcel zoned commercial) for purposes of evaluating a regulatory taking).

- Treatment by government. Four contiguous lots treated separately for property tax purposes must be combined for regulatory takings purposes. *Spiegelberg*, 717 N.W. 2d at 643.

To avoid arbitrary and inequitable results under the Wisconsin Rule, other jurisdictions have adopted a more "flexible approach," looking at a variety of factors in determining the relevant parcel. *See, e.g., Machipongo Land & Coal Co., v. Dep't of Envtl. Protection*, 799 A.2d 751, 768-69 (Pa. 2002) (identifying the following factors: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings, the timing of the transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and the landowner's plans for

development); *Loveladies Harbor*, 28 F.3d at 1181 (1994) (recommending a "flexible approach, designed to account for factual nuances"); *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (using a "flexible approach" whereby the critical issue is the economic expectations of the property owner). Indeed, flexibility is the hallmark of this Court's regulatory takings cases. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 321 (summarizing the Court's rejection of "categorical" and "per se" rules).

IV. THE WISCONSIN RULE DISCOURAGES THE COMMON OWNERSHIP OF ADJACENT LOTS.

By consolidating adjacent lots under common ownership, the Wisconsin Rule increases the financial risks of common ownership of adjacent lots. The Wisconsin Rule spreads the escalating cost of regulation across a larger denominator of land value and investment-backed expectations, making it less likely that a land-use regulation will be declared a regulatory taking. Greater exposure to unreasonable regulations increases the financial risk associated with the common ownership of adjacent lots. Creating a financial disincentive to common ownership of adjacent lots could adversely affect economic development and the real estate market.

Acquiring parcels of real estate increases the amount of contiguous acreage and creates different economic development opportunities. For example, owning a single commercial parcel less than a half-acre in size may limit the potential uses to office or retail, given the floor area and parking requirements found in most building and zoning codes. However, if the parcel is owned with adjacent parcels, the total acreage may allow for additional uses, such as

a gas station or a restaurant. The Wisconsin Rule discourages acquisition of adjacent parcels, suppressing the potential for a more comprehensive and diverse economic development area that includes hotels, mixed-use residential or a regional shopping center.

In addition, adjacent parcels are often acquired to avoid geographic or environmental constraints. For example, a parcel with a large wetland or steep sloping terrain may prompt the acquisition of an adjacent parcel that is relatively flat and dry to create more developable land. Given state or local regulations prohibiting development on or near steep slopes or wetlands, acquisition of the adjacent parcel expands development activity onto the more buildable parcel. The Wisconsin Rule deters this practice.

Homeowners also purchase adjacent lots for a variety of reasons. Some purchase adjacent lots for investment potential, especially in fast-growing areas. Others purchase adjacent lots to have extra room for the children to play or to create a privacy buffer from their neighbors. Owning an adjacent lot also provides control over the lot and its development. In some cases, owners of adjacent lots will place covenants or restrictions on the use of the lot before selling to ensure the use of the lot (e.g., the size or location of any building) is compatible with their neighboring home. Again, the Wisconsin Rule deters these practices.

The Wisconsin Rule discourages the purchase and common ownership of adjacent lots by increasing the financial risks of owning them. In response, some may regard common ownership of nonadjacent lots or ownership of adjacent lots by different legal entities as viable economic options. Purchasers of adjacent lots can arguably evaluate the risks and benefits of making

such an investment in light of the Wisconsin Rule. However, if property is transferred without the help of professional REALTORS®, attorneys, or other advisors and the transfer results in common ownership of adjacent properties (as apparently happened with the Murrs), the Wisconsin Rule harms these property owners. Moreover, if someone already owns adjacent lots, he or she will be disadvantaged by the Wisconsin Rule and suffer the financial consequences associated with it. Constitutional protections should not depend on arbitrary characteristics, including whether a property owner had the financial means or knowledge to hire advisors.

The game of *Monopoly* provides a useful analogy to illustrate the potential effect of the Wisconsin Rule on economic development, property owners and the real estate market. In *Monopoly*, as players roll the dice and move around the board, they attempt to acquire real estate based upon a variety of factors including location, price, and proximity to other property they own. While some players prefer to own property spread around the board, others prefer to own property that is contiguous with other properties in hopes of acquiring all the property in one color group. Then, the player benefits by charging additional amounts for properties improved with houses and hotels. The rules benefit the common ownership of contiguous property because they provide the owner with more options for changing the use.

If the rules of the game radically changed and players were penalized – not rewarded – for owning contiguous property, the game would be played differently. The ownership of contiguous property would be less desirable than the ownership of noncontiguous property. If the rules were changed *before* the game began, the players would adjust their

buying preferences accordingly and purchase only property that was not contiguous. If, on the other hand, the rules of the game changed *after* the game had begun, players who had already purchased contiguous property would be disadvantaged and the value of their property would decline.

Moreover, depending upon the nature of the rule change, players may be unable to build the houses or hotels on each of the parcels as intended when purchasing the property. They may be unable to sell or trade the property to other players depending upon the rule change, or if the other players would also be subject to the same penalties or restrictions related to ownership of the property.

This is not a game. The Wisconsin Rule treats the common ownership of adjacent lots differently than other lots and, as a result, treats the owners of those lots unfairly. The economic injuries caused by the St. Croix ordinance and the Wisconsin Rule should not be "disproportionately concentrated on a few persons" such as the Murrs. *See Penn Central*, 438 U.S. at 124.

CONCLUSION

For the reasons stated above, we join the Petitioners and request that this Court declare the Wisconsin Rule invalid and remand the case to the Wisconsin courts to determine whether the substandard lot provisions in St. Croix County's ordinance constitute a regulatory taking under the *Penn Central* balancing test.

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